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# Supreme Court of the United States

DEBORAH ORLANDO COONEY,
*Petitioner*,

v.

LYLE ROSSITER, JR, M.D.; KATHRYN BISCHOFF; BRIAN KLAUNG; JUDGE STEVEN NORDQUIST; DEPARTMENT OF CHILDREN AND FAMILY SERVICES BY EDWIN MCEWEN, ACTING DIRECTOR; ADMINISTRATIVE LAW JUDGE DANIEL BAECHLE; and DANIEL J. CAIN,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals erred in finding as a matter of law that court-appointed custodial evaluators and child representatives are entitled to absolute quasi-judicial immunity in claims brought against them under 42 U.S.C. § 1983, despite the fact that these positions did not exist in 1871 and there were no functional equivalents to these positions that were afforded absolute immunity in 1871, when section 1983 was enacted.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The Petitioner here and Appellant below is Deborah Orlando Cooney.

The Respondents here and Appellees below are Lyle Rossiter, Jr., M.D. and Kathryn Bischoff.

Petitioner has filed a notice with the Clerk of this Court pursuant to Rule 12.6 notifying the Court that Respondents Brian Klaung, Judge Steven Nordquist, Department of Children and Family Services by its Acting Director Edwin McEwen, Administrative Law Judge Daniel Baechle and Daniel J. Cain, who were also Appellees in the proceedings below, have no interest in the outcome of this petition.

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*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Deborah Orlando Cooney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## DECISIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 583 F.3d 967 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The order of United States Court of

Appeals for the Seventh Circuit denying Petitioner's petition for rehearing or rehearing en banc is reprinted in the Appendix. Pet. App. at 49a. The memorandum and decision of United States District Court for the Northern District of Illinois is unpublished and reprinted in the Appendix. Pet. App. at 8a.

## JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on September 30, 2009, and its judgment on Petitioner's petition for rehearing or rehearing en banc was entered on October 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

42 U.S.C. § 1983, which was enacted by Congress to enforce the provisions of the Fourteenth Amendment, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . . .

## STATEMENT OF THE CASE

This petition seeks review of a decision by a panel of the Seventh Circuit Court of Appeals affirming a district court ruling extending quasi-judicial absolute immunity to a court-appointed child custody evaluator and a court-appointed child representative in an action brought against them under 42 U.S.C. § 1983. Whether individuals performing these functions are entitled to absolute immunity is an important issue that has never adequately been addressed by the lower courts. There are conflicting decisions in the circuit courts of appeals as to which type of immunity, if any, is to be afforded to these individuals.

This Court's well-established precedent makes clear that a court cannot establish new immunities for section 1983 liability that did not exist in 1871—when section 1983 was enacted—even for public policy reasons. *Malley v. Briggs*, 475 U.S. 335, 339, 340 (1986). Although lower court decisions hold that custodial evaluators and child representatives enjoy absolute immunity for section 1983 purposes, none of these cases properly analyze this immunity under the framework of whether a custodial evaluator or child representative, or their functional equivalents, enjoyed absolute immunity in 1871. If child custody evaluators and/or child representatives did not enjoy absolute immunity for their official duties in 1871, absolute immunity is not available to them under

section 1983. *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part) (citations omitted).

However, lower courts have not applied this rigorous approach. Instead, courts have expanded the scope of absolute immunity for public policy reasons, and impermissibly afforded absolute immunity to individuals holding these and similar positions. Because of their failure to follow Supreme Court precedent, the circuits are split as to which kind of immunity these individuals are entitled—witness, quasi-judicial, prosecutorial or qualified.

Justices Thomas and Scalia have also concluded that lower courts are not using the proper immunity analysis. In dissenting from a denial of a petition for writ of certiorari, Justices Thomas and Scalia set forth the proper test for determining whether absolute immunity should be granted in section 1983 actions, and found that at least with regard to social workers, lower courts had granted them immunity without seriously considering whether social workers enjoyed absolute immunity for their official duties in 1871. *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., Scalia, J., dissenting). By granting this petition, this Court can finally address the issue.

Additionally, this Court recently granted certiorari in a case involving prosecutorial immunity for section 1983 actions, but the case was ultimately settled before this Court could issue its decision. *See*, *Pottawattamie County, Iowa v. McGhee*, Supreme Court Docket No. 08-1065. Similar to the *Pottawattamie* case, this case presents the legal issue of absolute immunity—including prosecutorial immunity—and this petition gives this Court a second chance to address and settle the immunity issues.

This Court's intervention is required, as lower courts continue to expand the scope of absolute immunity without undertaking the requisite analysis of whether such immunity was afforded to the corresponding positions when section 1983 was enacted. In numerous cases, lower courts have extended this absolute immunity to an increasing number of non-judges, which allowed these people to escape liability even when they have maliciously and intentionally violated a person's constitutional protections.

Although courts are ostensibly expanding the scope of immunity under the functional approach to immunity, public policy is clearly the factor most at play in these decisions despite this Court's clear prohibition against including public policy concerns in the immunity analysis. *Tower v. Glover*, 467 U.S. 914, 922-923 (1984). Affording court-appointed custody evaluators and child representatives *qualified* (rather than absolute) immunity is not only appropriate under the law, but it is more than sufficient to protect the relevant public policy interests at play in these cases.

**A. Factual Background.**

This case involves highly contentious custody proceedings wherein Petitioner's minor children were removed from her custody and she was prohibited from seeing them for over four years. Petitioner's due process rights were violated due to the intentional, malicious actions of a court-appointed custodial evaluator and child representative acting in furtherance of a conspiracy with a state actor to defraud the court and deprive Petitioner custody of her two minor children. Despite this fraudulent and intentional misconduct, the district court afforded Respondents

quasi-judicial immunity, and that decision was upheld on appeal.

A 1998 divorce decree awarded Petitioner sole custody and care of two minor children born to Petitioner and her husband Lorenzo Orlando ("Lorenzo") during their marriage. R. 310-2, ¶ 24, p. 10.[1] In 2001, Petitioner filed a petition for removal of the minor children so that she and her children could move from Illinois to Ohio to pursue a job opportunity. Lorenzo filed a response to the petition for removal and a counter-petition for change of custody. R. 179 at 3.

On October 17, 2002, the judge presiding over Petitioner's custody matter appointed Respondent Kathryn Bischoff ("Bischoff"), an attorney, to be the minor children's child representative pursuant to 750 ILCS 5/506(a)(3). R. 179 at 3. The Seventh Circuit explained that "the child's representative is a hybrid of a child's attorney . . . and a child's guardian ad litem." Pet. App. at 3a.

The duties of a child representative are to "advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, . . . The child representative shall consider, but not be bound by, the expressed wishes of the child. . . . The child representative shall disclose the position as to what the child representative intends to advocate in a pre-trial

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[1] Although not included in the appendix, Petitioner is including citations to the record to support her factual allegations pursuant to Supreme Court Rule 12.7.

memorandum that shall be served upon all counsel of record prior to the trial. . . ." 750 ILCS 5/506(a)(3).

Thus, a child representative functions as an investigator who ascertains the facts and renders a recommendation as to the best interests of the child, similar to the role of a social worker in the prejudicial phase. *See, e.g., In re S.M.*, 118 Cal.App.4th 1108, 1116, 13 Cal.Rptr.3d 606, 611 (4th Dist. 2004) (a social worker has "a duty to inquire about and obtain, if possible, all of the information about a child's family history."); *In re F.C. III*, 2010 WL 60747, *12 (Cal. App. 5th Dist. 2010) ("a social worker . . . shall render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child."); *Devine v. Washington Dept. of Social and Health Svcs.*, 130 Wash.App. 1033, *1 (Wash. App. 2nd Div. 2005) (a social worker's duties include conducting an investigation, and making a recommendation as to the best interests of a child).

In 2004, Petitioner requested the appointment of a custodial evaluator under 750 ILCS 5/605(a). Bischoff, after confirming Lyle Rossiter, Jr., M.D.'s ("Rossiter") interest, directed the judge to appoint Rossiter as the custodial evaluator, and Rossiter was so appointed. R. 310-2 at 15-16.

Rossiter and Bischoff engaged in numerous fraudulent and intentional acts of misconduct in concert with other actors involved in the custody proceedings. They both engaged in fraudulent misconduct while conducting an investigation. Following the investigation, Rossiter prepared a fraudulent report which was submitted to the court, and Rossiter relied on his report when he testified at trial. As a result of this

misconduct, Petitioner's children were removed from her custody and Petitioner was prohibited from contact with her children.

The lower courts afforded Rossiter and Bischoff absolute quasi-judicial immunity for the wrongful acts they committed during their investigation. Rossiter was also afforded the same immunity for the subsequent misconduct he committed in court.

**B. Proceedings Below.**

On August 20, 2008, the United States District Court for the Northern District of Illinois granted Respondents' motion to dismiss Petitioner's amended complaint alleging a civil rights conspiracy under section 1983 against the Respondents. Pet. App. at 8a. The district court never reached the merits of Petitioner's factual allegations, but instead ruled as a matter of law that the Respondents were entitled to quasi-judicial absolute immunity. Pet. App. at 21a-26a.

On September 30, 2009, the Seventh Circuit Court of Appeals affirmed the district court, and ruled as a matter of law that the Respondents were entitled to quasi-judicial absolute immunity because they were "acting as arms of the court." Pet. App. at 1a.

On October 29, 2009, the Seventh Circuit denied Petitioner's petition for rehearing or rehearing en banc. Pet. App. at 49a.

## REASONS FOR GRANTING THE PETITION

The Respondents fail to qualify for absolute immunity because their positions did not exist in 1871, when section 1983 was enacted, and there were no functional equivalents to these positions in 1871 who were afforded absolute immunity. Conflicting lower

court decisions demonstrate that immunity is not applied consistently in section 1983 cases, as evidenced by splits in the circuits applying the law. In this case, both the district court and Seventh Circuit failed to undertake the requisite "functional approach" analysis in reaching their decision, and thus reversal is warranted.

This Court has previously acknowledged that there is substantial confusion among the lower courts on the issue of absolute immunity. Justices Thomas and Scalia described the failure of the lower courts to adequately address this issue in their dissent from denial of certiorari relative to immunity for social workers in *Hoffman*. More recently, this Court granted certiorari relative to immunity for prosecutors in the *Pottawattamie* case, which was settled after oral argument but before decision. Granting certiorari in this case will provide this Court with the opportunity to settle the legal issue of absolute immunity as it pertains to section 1983 actions, and resolve the conflict among the circuits.

## I. LOWER COURTS FAIL TO PROPERLY ANALYZE WHETHER INDIVIDUALS ARE ENTITLED TO ABSOLUTE IMMUNITY IN SECTION 1983 ACTIONS.

The starting point for analyzing immunity defenses under section 1983 is the relevant common law in 1871, when section 1983 was enacted. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). However, in determining whether individuals are absolutely immune in section 1983 actions, lower courts have repeatedly failed to follow this Court's decisions limiting the application of the immunity doctrine to

the historical boundaries of absolute immunity in 1871. *See*, *Hoffman*, 511 U.S. at 1060.

### A. Courts Have Failed to Properly Analyze Whether Custodial Evaluators or Child Representatives Were Absolutely Immune Under the Common Law.

In this case, both the district court and the Seventh Circuit failed to analyze the Respondents' immunity defenses under the required historical framework. In awarding immunity to Rossiter and Bischoff, the Seventh Circuit found that they were acting "within the course of their court-appointed duties." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009); Pet. App. at 4a. The Seventh Circuit held that custodial evaluators and child representatives "are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants, just as judges do." *Id.*

However, this reasoning impermissibly incorporates a public policy argument for awarding Rossiter and Bischoff absolute immunity. Rather, the lower courts should have analyzed whether Respondents' positions, or their functional equivalents, existed in 1871 and were afforded immunity at common law. Whether public policy is better served by granting these individuals immunity for their services is irrelevant; the law is clear that public policy interests cannot confer absolute immunity. *See*, *Tower*, 467 U.S. at 922-923 ("We do not have a license to establish immunities from section 1983 actions in the interests of what we judge to be sound public policy.").

In this case, neither the Seventh Circuit nor the district court properly discussed whether custodial evaluators or child representatives (or their func-

tional equivalents) existed at common law, and if so, whether they were afforded absolute immunity in 1871. This is a necessary step in the absolute immunity analysis. *See*, *Tower*, 467 U.S. at 921-923 (there is no immunity for public defenders, largely because there was no such office or position in existence in 1871); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 434-435 (1993) (there is no immunity for court reporters, largely because official court reporters did not begin appearing until after 1871).

Indeed, Justices of this Court have lamented lower courts' neglect of this analysis. In analyzing cases that provide for absolute immunity to social workers, Justices Thomas and Scalia found that no case "has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871." *Hoffman*, 511 U.S. at 1060. Justices Thomas and Scalia further questioned whether social workers (or their counterparts) even existed in 1871, which had not been demonstrated, because if they did not exist in 1871 "the argument for granting absolute immunity becomes (at least) more difficult to maintain." *Id.*

The Seventh Circuit noted that Bischoff, as a child representative, performs a "hybrid" function similar to that of a social worker. Fifteen (15) years ago, Justices Thomas and Scalia properly exclaimed: "We should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity." *Hoffman*, 511 U.S. at 1060. Over the past fifteen (15) years, the circuits have issued conflicting decisions on this legal issue. There is a great need for this Court to settle the issue, and this Court should grant this petition to ensure that the lower courts are undertaking the proper legal analysis in immunity cases.

### B. Under the Functional Approach to Absolute Immunity, Custodial Evaluators and Child Representatives Are Not Entitled to Quasi-Judicial Immunity.

As emphasized by Justice Scalia, expansion of absolute immunity beyond its scope in 1871 is unquestionably unsupportable. *Burns v. Reed*, 500 U.S. 478, 497-498 (1991) (Scalia, J., concurring in part and dissenting in part); *see also Buckley*, 509 U.S. at 279-280 (Scalia, J., concurring). Under the functional approach to absolute immunity, this Court has extended the protection of quasi-judicial immunity to those who perform a function comparable to that of a judge. *Butz v. Economou*, 438 U.S. 478, 512-513 (1978). But even under the functional approach to absolute immunity, neither custodial evaluators nor child representatives are entitled to quasi-judicial immunity.

To determine whether someone seeking absolute judicial immunity performed a judicial act, the Court considers two factors relating to "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

Psychiatrists, such as Rossiter, acting as court-appointed child custody evaluators do not perform judicial acts in the discharge of the judicial function. Instead, they investigate and examine medical conditions, prepare reports of their findings, and testify in court to provide expert opinions. *See*, 750 ILCS 5/605. These are not acts normally performed by a judge. In fact, if a judge attempted to conduct a medical examination or testify about the facts of a case over

which he was presiding, it would likely constitute judicial misconduct.

The closest analogy for the acts performed by a custodial evaluator would be those of an investigator. Like an investigator, Rossiter gathered information from various sources, including the subject of the investigation, and prepared a report for use by other parties. As this Court has long held, individuals performing the investigative function receive qualified, not absolute, immunity. *Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'")

Child representatives, such as Bischoff, also do not qualify for the protection of absolute immunity under the functional approach because they do not perform a function normally performed by a judge. Rather, as the Seventh Circuit stated, child representatives act as a "hybrid of a child's attorney . . . and a child's guardian ad litem" . . . who "'shall offer evidence-based legal arguments.'" *Cooney*, 583 F.3d at 967, citing 750 ILCS 5/506; Pet. App. at 2a. Similar to a social worker, a child representative is charged with investigating the facts and preparing a report concerning the best interests of a minor child, who is one party in a multi-party dispute. *See, e.g.*, 750 ILCS 5/506(a)(3). A child representative does not act as a neutral decisionmaker. A child representative's advocacy on behalf of a party is not the function of a judge. It is quite the opposite.

This Court has refused to extend judicial immunity to officers within the judicial system who do not perform the judicial function, or to proceedings

outside of the judicial system which lack comparable procedural safeguards. For example, in *Antoine*, this Court refused to extend absolute judicial immunity to court reporters. 508 U.S. at 436-437. In rejecting the claim for absolute immunity, this Court reaffirmed its consistent view that absolute immunity is to be sparingly granted, that qualified immunity is presumed to provide sufficient protection from excessive litigation, and that the person seeking absolute immunity bears the burden of showing that it is justified. *Id.*, at 432-433.

The foregoing demonstrates that court-appointed custodial evaluators and child representatives should be afforded qualified, not absolute, immunity. This Court should grant the petition to resolve the conflict between the circuits on this legal issue.

### C. The Issues In This Case Are Similar to Those In *Pottawattamie County, Iowa v. McGhee*, a Case In Which This Court Granted Certiorari, but Was Settled Prior to This Court's Decision.

On April 20, 2009, this Court granted certiorari in *Pottawattamie County, Iowa v. McGhee*, 129 S.Ct. 2002 (2009). On November 4, 2009, this Court heard oral arguments in the *Pottawattamie* case, but the parties settled and the case was dismissed pursuant to Rule 46 before this Court could render a decision on the merits. *See*, Docket No. 08-1065.

The *Pottawattamie* case involved a split between the circuits about the scope of absolute prosecutorial immunity under section 1983. The Eighth Circuit held that a criminal defendant's substantive due process rights were violated when a prosecutor procured false testimony, and the prosecutor's subsequent use of the false testimony at trial violated the

defendant's liberty interests. *Pottawattamie County, Iowa v. McGhee*, 547 F.3d 922 (8th Cir. 2009). The Eighth Circuit found that prosecutors were not entitled to qualified immunity for their procurement of false testimony, and further, because of said procurement of false testimony, the prosecutors were not entitled to absolute immunity for the use of that testimony at trial. *Id.*, at 932-933.

The holding in *Pottawattamie* was in conflict with Seventh Circuit precedent, which held that there was no constitutional violation in the procurement of false testimony, and that the prosecutor was entitled to absolute immunity for the use of any false testimony at trial in his prosecutorial capacity. *Buckley v. Fitzsimmons*, 20 F.3d 789, 794-795 (7th Cir. 1994).

The Petitioners in the *Pottawattamie* case asked this Court to resolve this conflict, arguing that the Eighth Circuit's decision (while following the Second Circuit) conflicts with the Third and Seventh Circuits. *See, Zahrey v. Coffee*, 221 F.3d 342, 354-355 (2nd Cir. 2000); *Buckley, supra*; *Michaels v. New Jersey*, 222 F.3d 118, 122-123 (3rd Cir. 2000). This Court granted certiorari in order to settle the law and reconcile the circuit split.

Although the instant petition involves quasi-judicial immunity rather than prosecutorial immunity, the legal issues are similar. Here, the court-appointed custodial evaluator and child representative were afforded absolute immunity for wrongful acts they committed while conducting an investigation. Rossiter was also afforded absolute immunity for the wrongful acts he committed during his subsequent testimony and actions in court, which were predicated on the fraudulent misconduct that he and Bischoff committed during their investigation.

The lower courts did not distinguish Rossiter's misconduct committed during the investigation versus the misconduct he committed during the court proceedings. Moreover, the lower courts did not discuss whether qualified immunity, or no immunity whatsoever, would have been appropriate for either Respondent's misconduct. Rather, the lower courts awarded Respondents quasi-judicial absolute immunity for all of their acts committed both during their investigation and in court.

Due to the similar immunity issues that this case and the *Pottawattamie* case present, this Court should grant certiorari in this case to resolve the unsettled and conflicting decisions among the circuits.

## II. LOWER COURTS GRANT IMMUNITY IN SECTION 1983 ACTIONS INCONSISTENTLY, CREATING A CONFLICT AMONG CIRCUITS.

Decisions of the lower courts are in conflict on the legal issue presented here. This confusion among the circuits exists because the courts are attempting to manipulate the law for public policy reasons to create absolute immunity for positions that did not exist at common law, and which are not functionally equivalent to those that did exist. Because there is no clear historical justification for absolute immunity for custodial evaluators or child representatives, the law is uncertain and often in conflict. This Court's intervention is required to settle the conflict, and provide predictability for participants in legal proceedings.

### A. The Circuits Are Split as to the Appropriate Type of Immunity to Grant to Custodial Evaluators.

Absolute Quasi-Judicial Immunity—1st, 3rd, 7th, 8th, 10th Circuits: Most circuits that have considered this issue have afforded court-appointed custodial evaluators absolute quasi-judicial immunity. *See, e.g., Brown v. Newberger*, 291 F.3d 89, 94 (1st Cir. 2002); *Hughes v. Long*, 242 F.3d 121, 126 (3rd Cir. 2001); *Cooney, supra* (7th Circuit); *Morstad v. Department of Corrections and Rehabilitation*, 147 F.3d 741, 744 (8th Cir. 1998); *Martinez v. Roth*, 53 F.3d 342, *3 (10th Cir. 1995).

Absolute Witness Immunity—6th Circuit: In analyzing the type of immunity to which custodial evaluators were entitled in section 1983 actions, the Sixth Circuit came to a different conclusion. In *Kurzawa v. Mueller*, the Sixth Circuit held that a court-appointed psychiatrist and psychologist were entitled to absolute immunity as witnesses, because they provided information to the court which is the function of a witness. 732 F.2d 1456, 1458 (6th Cir. 1984). The Sixth Circuit did not hold that court-appointed custodial evaluators were "arms of the court" entitled to quasi-judicial immunity, creating a split with the above circuits.

No Immunity—9th Circuit: The Ninth Circuit was previously in accord with the majority of the circuits in extending absolute quasi-judicial immunity to court-appointed psychiatrists. *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970). However, this determination was called into question with its decision in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003). In *Miller*, the Ninth Circuit indicated that a court-appointed psychiatrist does not perform a quasi-

judicial or prosecutorial function entitling the psychiatrist to absolute immunity, and the psychiatrist would not be entitled to any immunity at all. *Id.*, at 898-899.

The lack of clear guidance from this Court has led to splits among the circuits as to what type of immunity, if any, custodial evaluators are entitled. This Court's intervention is required to resolve this split.

### B. The Circuits Are Split as to the Appropriate Type of Immunity to Grant to Individuals Performing Similar Functions as Child Representatives.

In custody proceedings, it is common that the child's interest is represented by a child representative or social worker. However, lower courts have afforded these actors inconsistent types of immunities.

Child Representative: The Seventh Circuit explained that "the child's representative is a hybrid of a child's attorney . . . and a child's guardian ad litem." Pet. App. at 3a. As set forth *supra*, a child representative performs a function similar to that of a social worker. Child representatives and social workers are non-neutral actors who are charged with investigating the facts, preparing a report and recommendation, advocating for the best interests of the child, and presenting the child's case to the court in certain circumstances. Thus, child representatives should be afforded the same immunity that social workers are afforded.

However, as with custodial evaluators, the circuits are split on the legal issue of the applicable immunity to be afforded to social workers.

Social Worker—Absolute Prosecutorial Immunity—4th, 6th Circuits: Two Circuits afforded absolute immunity to social workers derived from absolute prosecutorial immunity. These Circuits held that social workers are entitled to absolute immunity when they investigate the facts and prepare a report, which the courts likened to the pre-judicial role of a prosecutor. *See*, *Vosburg v. Dep't of Soc. Services*, 884 F.2d 133, 135 (4th Cir. 1989); *Salyer v. Patrick*, 874 F.2d 374, 377-378 (6th Cir. 1989).

Social Worker—Not Entitled to Absolute Prosecutorial Immunity—9th Circuit: The Ninth Circuit is in conflict with the Fourth and Sixth Circuits. In *Beltran v. Santa Clara County*, the court held that social workers are not entitled to absolute prosecutorial immunity when they investigate the facts and prepare a report, as follows:

> Social workers are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury . . . . A prosecutor does not have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, or makes false statements in a sworn affidavit in support of an application for an arrest warrant. Furthermore, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting investigations have no such immunity.

514 F.3d 906, 907-908 (9th Cir. 2007), modified on rehearing en banc.

The prosecutorial immunity afforded to social workers is similar to the prosecutorial immunity issues raised in the *Pottawattamie* case.

Social Worker—Qualified Complaining Witness Immunity—5th Circuit: The Fifth Circuit held that social workers were entitled to qualified immunity as "complaining witness" for filing an affidavit recommending a change in child custody. *Austin v. Borel*, 830 F.2d 1356, 1361-1363 (5th Cir. 1987). The social worker's affidavit is similar to the child custody report that is prepared and filed by a child representative.

Social Worker—Qualified Immunity—1st, 10th, D.C. Circuits: Other circuits have properly concluded that social workers should receive qualified immunity for their investigatory conduct. *See, e.g., Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992); *Spielman v. Hildebrand*, 873 F.2d 1377, 1383 (10th Cir. 1989); *Gray v. Poole*, 275 F.3d 1113, 1117 (C.A.D.C. 2002). These Circuits properly held that social workers are not entitled to absolute immunity when they are performing the investigative function and other tasks in protecting the child's interests; similar to the function Bischoff performed in this case as a child representative.

### C. This Court Must Resolve the Split Among the Circuits.

The lower courts' application of absolute immunity to individuals acting as court-appointed custodial evaluators and child representatives (or similar functions) has created a confusing, conflicting and unworkable body of law that does not allow for predictability or cohesion. Under the current *ad hoc*

analysis performed by lower courts, public policy is stretched beyond its limits in order to reach the decisionmaker's desired result. This Court should grant this petition to settle the law and stop this improper expansion of absolute immunity.

## III. QUALIFIED IMMUNITY IS ADEQUATE TO PROTECT THE PUBLIC POLICY INTERESTS INVOLVED IN SHIELDING COURT-APPOINTED INDIVIDUALS FROM BURDENSOME LITIGATION.

This Court has been "cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court." *Forrester v. White*, 484 U.S. 219, 223-224 (1988). For this reason, this Court has been "quite sparing" in recognizing claims to absolute immunity, and has "refused to extend it any further than its justification would warrant." *Antoine*, 508 U.S. at 433 n.4, quoting *Burns*, 500 U.S. at 486-487.

However, the foregoing has shown that lower courts have expanded absolute judicial immunity beyond its original limited scope to cases such as this, where it should not apply. Absolute immunity should not be extended to individuals who did not have immunity in 1871, or their functional equivalents. Rather, these individuals should be afforded qualified immunity, which shields them from liability so long as they do not violate clearly established law of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982).

Well-established case law supports this argument. Historically, when evaluating claims for absolute immunity, courts presume that qualified rather than absolute immunity is sufficient to protect government

officials in the exercise of their duties. *Antoine*, 508 U.S. at 433 n.4, quoting *Burns*, 500 U.S. at 486-487. Moreover, qualified immunity strikes the proper balance between shielding government officials from excessive exposure to burdensome civil litigation while protecting the constitutional rights of victims injured by clearly unconstitutional misconduct. Affording court-appointed custodial evaluators and child representatives qualified immunity protects the public policy concerns that so many courts improperly inject in the absolute immunity analysis in an attempt protect government officials in the execution of their functions.

By extending absolute immunity to individuals holding positions that were not afforded absolute immunity under the common law in 1871, or their functional equivalents, lower courts have strayed from the guiding principle that absolute immunity that existed at common law in 1871 is the only immunity that can be applied in section 1983 actions. The continuing over-expansion of judicial immunity results in the courts denying compensation to victims of civil rights abuses and absolves individuals for their misconduct, even if it is intentional and fraudulent.

As the Illinois Appellate Court stated in *Skelly Oil Co. v. Universal Oil Products, Co.*, when the question arises of whether the court should refuse to search out for a remedy for a plaintiff, and thus permit the persons responsible for the pollution of the temple of justice to advance highly technical barriers to a recovery, the court should answer with an emphatic "no." 338 Ill.App. 79, 86 N.E.2d 875, 882 (1st Dist. 1949).

This Court should grant the petition in order to resolve the split among the circuits and clarify the scope of absolute immunity, so as to limit absolute immunity to the parameters originally provided for under the common law.

## CONCLUSION

For the reasons stated, this Court should grant the petition.

Respectfully submitted,

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January 27, 2010

# APPENDIX

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed: 09/30/2009]

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No. 08-3675

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DEBORAH ORLANDO COONEY,
*Plaintiff-Appellant*,

v.

LYLE ROSSITER, JR., *et al.*,
*Defendants-Appellees*.

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 C 2747—Marvin E. Aspen, *Judge*.

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SUBMITTED AUGUST 27, 2009—
DECIDED SEPTEMBER 30, 2009

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Before BAUER, POSNER, and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*. Deborah Cooney lost custody of her two sons after an Illinois state court found that she suffered from "Munchausen syndrome by proxy," in which "an individual produces or feigns physical or emotional symptoms in another person under his or her care. Usually the victim is a young child, and the person producing the symptoms may be the child's parent or caretaker, most often the

mother." American Medical Association, *Complete Medical Encyclopedia* 870 (Jerrold B. Leikin & Martin S. Lipsky eds. 2003); see also Thomas Lathrop Stedman, *Stedman's Medical Dictionary* 1906 (28th ed. 2006). She sued the state court judge (Judge Nordquist), and others as we'll see, in federal district court, charging constitutional violations. The district court dismissed the suit. Judge Nordquist is of course absolutely immune from suit, since he was acting in his judicial capacity in ruling that Cooney was not entitled to custody.

Cooney's complaint tells the following story. In 1998 she divorced her husband and was awarded custody of the couple's two sons. Later the ex-husband—through his attorney, defendant Cain—filed a petition to transfer custody to himself. Judge Nordquist, the judge presiding over the custody proceeding, appointed defendant Bischoff as the children's representative. Under Illinois law, in proceedings involving a minor, the court can appoint a lawyer (1) to represent the child as an attorney would represent an adult, (2) to be the child's representative, or (3) to be the child's guardian ad litem. 750 ILCS 5/506(a). The powers and duties of a child's representative are very similar to those of a guardian ad litem. Compare *id.*, § 5/506(a)(2) with *id.*, § 5/506(a)(3). The principal differences are that unlike a guardian ad litem a child's representative "shall consider, but not be bound by, the expressed wishes of the child" and "shall not render an opinion, recommendation, or report to the court and shall not be called as a witness" but instead "shall offer evidence-based legal arguments." *Id.*; see *In re Marriage of Bates*, 819 N.E.2d 714, 726 (Ill. 2004).

In other words, the child's representative is a hybrid of a child's attorney, 750 ILCS 5/506(a)(1), and a child's guardian ad litem. Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 Ill. B.J. 458, 460 (Sept. 2001); see *In re Marriage of Kostusik*, 836 N.E.2d 147, 158 (Ill. App. 2005). The more mature the child, the likelier the court is to appoint an attorney to represent the child; the less mature, the likelier that a guardian ad litem will be appointed; and for children of intermediate maturity, there is the child's representative. Cf. Gilmore, *supra*, at 461.

Cooney's complaint alleges that Bischoff "orchestrated" a court order appointing defendant Rossiter as the children's psychiatrist and began a "witch hunt" against Cooney by telling Rossiter that "this may be a situation of Munchausen syndrome (on the part of the Mother)." Eight months later Rossiter completed his report, concluding that Cooney was indeed exhibiting signs of Munchausen syndrome by proxy. He noted a number of occasions over a period of ten years on which Cooney had attempted to have doctors diagnose her older son with severe illnesses or injuries. According to the complaint, attorney Cain received a copy of Rossiter's report (from Rossiter, Bischoff, or the judge), but Cooney did not. Cain petitioned for an emergency order of protection that quoted directly from Rossiter's draft report. Judge Nordquist granted the petition, stating that Cooney was "armed and suicidal," and temporarily transferred custody of the children to her ex-husband, their father. "[T]hereafter, numerous other conspiratorial acts and violations" of Cooney's constitutional rights occurred, among them that defendant Klaung, the children's therapist, "made false statements" to the Department of Children and Family Services that led to a finding of child abuse by Cooney.

Rossiter and Bischoff are entitled to absolute immunity. Guardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. E.g., *Jones v. Brennan*, 465 F.3d 304, 308 (7th Cir. 2006) (Illinois law); *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) (same); *Hughes v. Long*, 242 F.3d 121, 127-28 (3d Cir. 2001); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984). They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants, just as judges do. Experts asked by the court to advice on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations "without the worry of intimidation and harassment from dissatisfied parents." *Id.* at 1458. This principle is applicable to a child's representative, who although bound to consult the child is not bound by the child's wishes but rather by the child's best interests, and is thus a neutral, much like a court-appointed expert witness.

Although Cooney charges that Rossiter and Bischoff were part of an illegal conspiracy to deprive her of custody of the children, they are entitled to absolute immunity because the specific acts (actual or alleged) of which she complains, such as that Bischoff and Rossiter communicated with each other about their perceptions of Cooney and the children, that the conclusions in Rossiter's report are false, and that Bischoff may have given a draft copy of the report to Cain but not to Cooney, all occurred within the course of their court-appointed duties. Cooney does not allege that Rossiter or Bischoff engaged in misconduct outside that course, as in *Jones v. Brennan, supra*, 465 F.3d at 308.

The appeal presents a second issue. Because lawyer Cain and therapist Klaung are private persons, Cooney could bring them within the reach of section 1983 only by charging that they had agreed with a state officer to deprive her of constitutional rights. See *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998).

Even before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009), a bare allegation of conspiracy was not enough to survive a motion to dismiss for failure to state a claim. E.g., *Loubser v. Thacker*, 440 F.3d 439, 443 (7th Cir. 2006); *Walker v. Thompson*, 288 F.3d 1005, 1007-08 (7th Cir. 2002); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d Cir. 1997); *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991). It was too facile an allegation. But it was a narrow exception to the notice-pleading standard of Rule 8 of the civil rules—a rare example of a judicially imposed requirement to plead facts in a complaint governed by Rule 8.

In *Bell Atlantic* the Supreme Court went further, holding that in complex litigation a complaint must, if it is to survive dismissal, make plausible allegations. In *Iqbal* the Court extended the rule of *Bell Atlantic* to litigation in general. *Brooks v. Ross*, 2009 WL 2535731, at *5 (7th Cir. Aug. 20, 2009); *Hensley Mfg., Inc. v. ProPride, Inc.*, 2009 WL 2778220, at *8 n. 4 (6th Cir. Sept. 3, 2009); *Fowler v. UPMC Shadyside*, 2009 WL 2501662, at *4 (3d Cir. Aug. 18, 2009); *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 n. 7 (9th Cir. 2009).

The Court's specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden. In *Iqbal* it was with the inroads into the

defense of official immunity—which is meant to protect the officer from the burden of trial and not merely from damages liability—that allowing implausible allegations to defeat a motion to dismiss would make. *Smith v. Duffey*, 576 F.3d 336, 339-40 (7th Cir. 2009). Thus, as the Court said in *Iqbal*, "determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 129 S. Ct. at 1950; cf. *Courie v. Alcoa Wheel & Forged Products*, 2009 WL 2497928, at *2 (6th Cir. Aug. 18, 2009).

In other words, the height of the pleading requirement is relative to circumstances. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases. This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy; and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility.

Even before the Supreme Court's new pleading rule, as we noted, conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough. The complaint in this case, though otherwise detailed, is bereft of any suggestion, beyond a bare conclusion, that the remaining defendants were leagued in a conspiracy with the dismissed defendants. It is not enough (and would not have been even before *Bell Atlantic* and *Iqbal*) that the complaint charges that "Bischoff and Dr. Lyle Rossiter, with the

aid of Judge Nordquist, Dan Cain, and Brian Klaung continued the ongoing violations of Plaintiff, Deborah's Constitutional rights." That is too vague. With regard to Cain, the only specific allegations in the complaint are that he encouraged Bischoff to tell Rossiter to complete his report "expeditiously"; that he received Rossiter's report before Cooney did; and that he "took control" of the meeting in camera in which all the attorneys discussed the report with Judge Nordquist. The only specific allegation regarding Klaung is that he reported Cooney to the child welfare authority several months after she lost custody of the children. No factual allegations tie the defendants to a conspiracy with a state actor. See, e.g., *Fries v. Helsper*, *supra*, 146 F.3d at 457-58; *Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002).

Cooney's final argument is that the district court abused its discretion in denying her motion under Rule 59(e) of the Federal Rules of Civil Procedure to be permitted to file a second amended complaint that would cure the pleading deficiencies that the court cited in its opinion dismissing the first amended complaint. She had filed that complaint after the defendants filed motions to dismiss her original complaint, and from those motions she was aware of the pleading hurdles that she would need to clear. As we said in *Harris v. City of Auburn*, 27 F.3d 1284, 1287 (7th Cir. 1994), a plaintiff who seeks to amend her complaint post-judgment "had better provide the district court with a good reason." Cooney provided the court with no reason.

AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed: 08/20/08]

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No. 07 C 2747

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DEBORAH ORLANDO COONEY, RHONDA GRIFFITH-KRAUT, JULIA BORNHUETTER-COLLOTON, and Others Similarly Situated,
*Plaintiffs*,

v.

LYLE ROSSITER, JR., M.D., *et al.*
*Defendants*.

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MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, *District Judge*:

Presently before us are multiple motions to dismiss and motions to transfer venue filed by the defendants. For the reasons stated below, we dismiss this action in its entirety and deny the motions to transfer venue as moot.

BACKGROUND

Plaintiffs Deborah Orlando Cooney, Rhonda Griffith-Kraut, and Julia Bornhuetter-Colloton (collectively, "Plaintiffs") initially filed this purported class action on May 16, 2007, claiming that the various defendants violated their rights under the U.S. Constitution by engaging in misconduct during the Plaintiffs' individual state-court custody proceedings. Defendants then filed motions to dismiss and/or motions to transfer

venue. Rather than respond to those motions, Plaintiffs requested voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2), which we permitted.

On January 7, 2008, Plaintiffs filed their Amended Class Action Complaint ("Complaint") against the current twelve defendants, who played some role in the custody proceedings. Each of the defendants has filed or renewed a motion to dismiss, and seven additionally seek to transfer venue of the case to the Northern District of Illinois, Western Division. In their motions to dismiss, defendants primarily contend that: (1) the *Rooker-Feldman* doctrine deprives us of jurisdiction over Plaintiffs' claims; (2) the particular defendant is immune from suit; (3) the Complaint fails to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6); and (4) the Complaint does not comply with Federal Rules of Civil Procedure 8 and 10. We address each issue as necessary below.

## STANDARD OF REVIEW

The purpose of a motion to dismiss under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990). Rule 12(b)(1) requires dismissal of claims over which the federal court lacks subject matter jurisdiction. Jurisdiction is the "power to decide," and must be conferred upon the federal courts. *In re Chi., Rock Island & Pacific R.R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). The plaintiff faced with a 12(b)(1) motion to dismiss bears the burden of proving that the jurisdictional requirements have been met. *Kontos v. U.S. Dep't of Labor*, 826 F.2d 573, 576 (7th Cir. 1987).

A court may grant a motion to dismiss under Federal Rule of Procedure 12(b)(6) only if a complaint lacks "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); *see Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618-19 (7th Cir. 2007); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776-77 (7th Cir. 2007). A sufficient complaint need not give "detailed factual allegations," but it must provide more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 127 S. Ct. at 1964-65; *Killingsworth*, 507 F.3d at 618-19. These requirements ensure that the defendant receives "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S. Ct. at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 102 (1957)); *see also* Fed. R. Civ. P. 8(a). In evaluating a motion to dismiss, we must accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Thompson v. Ill. Dep't of Prof'l Reg.*, 300 F.3d 750, 753 (7th Cir. 2002).

## ANALYSIS

### *I. Rooker-Feldman*

We first address the *Rooker-Feldman* jurisdictional argument raised by various defendants. Simply put, the *Rooker-Feldman* doctrine precludes individuals from seeking review of state court judgments in federal district court. *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 414 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 465, 103 S. Ct. 1303, 1306 (1983); *see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 1521-22 (2005). This doctrine exists because "no matter how erroneous or

unconstitutional the state court judgment may be, the Supreme Court of the United States is the only federal court that could have jurisdiction to review a state court judgment." *Taylor v. Fed. Nat'l Mortgage Ass'n*, 374 F.3d 529, 532 (7th Cir. 2004) (internal quotation omitted); *see also Brokaw v. Weaver*, 305 F.3d 660, 664-65 (7th Cir. 2002). As the Seventh Circuit explained, "the Rooker-Feldman doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does [s]he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which [s]he was a party?" *Gash Assocs. v. Vill. of Rosemont, Ill.*, 995 F.2d 726, 728 (1993) (internal citations omitted). If the former, and provided that the plaintiff has an opportunity to present her claims to the state court, the federal court lacks jurisdiction. *Id.*

Although the *Rooker-Feldman* doctrine might seem to bar Plaintiffs' claims at first glance, we find it inapplicable at this juncture in the case. The Supreme Court in *Exxon* emphasized that *Rooker-Feldman* applies only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobile Corp.*, 544 U.S. at 284, 125 S. Ct. at 1521-22. Interpreting Exxon, the Seventh Circuit noted that "the doctrine only applies to cases like *Rooker and Feldman* where 'the losing party in state court filed suit in federal court *after the state proceedings ended*.'" *Truserv Corp. v. Flegles, Inc.*, 419 F.3d 584, 591 (7th Cir. 2005) (quoting *Exxon* (emphasis added)). Indeed, "[u]nder the *Rooker-Feldman* doctrine post-*Exxon*, timing is everything." *In re Hodges*, 350 B.R. 796, 803 (Bankr. N.D. Ill. 2006) (internal quotation omitted).

Here, however, the Complaint does not suggest that the state-court judgments related to Plaintiffs' constitutional allegations have concluded. To the contrary, the Complaint indicates that the divorce and custody proceedings remain ongoing in the state system. Although some of the orders challenged by Plaintiffs were issued years ago, these orders are not necessarily final. Plaintiffs frequently describe critical orders of protection and for transfer of custody as "emergency" or "interim" in nature, suggesting that they remain subject to change. Moreover, each case remains pending, further suggesting that these orders may be amended, or appealed to the Illinois appellate courts once the divorce and concomitant custody decisions become final. Accordingly, based on our reading of the Complaint, we conclude that *Rooker-Feldman* does not bar Plaintiffs' federal claims at this time.[1]

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[1] We also have considered whether other abstention doctrines might preclude Plaintiffs' claims and determine that none apply. For example, the domestic relations exception to federal jurisdiction set forth in *Ankenbrandt v. Richards* is not relevant because Plaintiffs do not allege diversity jurisdiction and, moreover, Plaintiffs are not explicitly seeking relief from a custody or ancillary decree. 504 U.S. 689, 703-04, 112 S. Ct. 2206, 2215 (1992). In addition, *Younger* abstention is not appropriate because the state of Illinois is not itself a party to (even if it has an interest in) the underlying state court proceedings. *Younger v. Harris*, 401 U.S. 37, 44-46, 91 S. Ct. 746, 750-52 (1971); *see Forty One News, Inc. v. Cty. of Lake*, 491 F.3d 662, 665 (7th Cir. 2007) (stating that "Younger abstention is appropriate only when there is an action in state court against the federal plaintiff and the state is seeking to enforce the contested law in that proceeding"); *see, e.g., Stroman Realty, Inc. v. Grillo*, 438 F. Supp. 2d 929, 933-34 (N.D. Ill. 2006) (abstaining under Younger where plaintiff asked the federal court to stay administrative proceedings brought by Illinois against him for alleged

## II. Immunity

Although *Rooker-Feldman* is not outcome-determinative, various defendants have also asserted that they are immune from this litigation in their official or individual capacities, or both.[2] We address each argument in turn.

### A. Eleventh Amendment Immunity

Several defendants (namely, Judge Nordquist and the Illinois Department of Children and Family Services ("DCFS")) argue that the Eleventh Amendment immunizes them from suit in their official capacities. Indeed, to the extent that Plaintiffs bring this action against agencies of the State of Illinois, or state employees in their official capacities, such claims must fail.

The Supreme Court "has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens."[3] *Edelman v.*

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violations of real estate licensing statute); *Borum v. Bonk*, No. 99 C 2069, 2000 WL 263958, at *1-2 (N.D. Ill. Feb. 29, 2000) (abstaining where state agency initiated custody proceedings on behalf of allegedly abused children).

[2] The Complaint does not indicate whether Plaintiffs are suing individual defendants in their personal or official capacities, and we shall address both.

[3] While three exceptions to this rule exist, none are relevant here. *Peirick v. Ind. Univ. Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007). The State of Illinois has not waived its immunity by consenting to suit in federal court for § 1983 claims and Congress has not expressly abrogated Illinois' immunity through its own action. *Id.* Moreover, Plaintiffs do not seek prospective equitable relief pursuant to *Ex Parte Young*. 209 U.S. 123, 159-60, 28 S. Ct. 441 (1908); *see Peirick*, 510 F.3d at 695. To the contrary, Plaintiffs seek money damages. (Compl. at 41.)

*Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 1355 (1974); *see Peirick*, 510 F.3d at 694-96; *Ameritech Corp. v. McCann*, 297 F.3d 582, 585-86 (7th Cir. 2002). "State agencies and officials sued in their official capacities are 'the state' for Eleventh Amendment purposes." *Olison v. Ryan*, No. 99 C 4384, 2000 WL 1263597, at *4 (N.D. Ill. Sept. 5, 2000) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989)). Thus, pursuant to the Eleventh Amendment, we lack jurisdiction over claims against such defendants, including individual defendants sued in their official capacities.

*I. DCFS*

Without question, DCFS is a state agency and is entitled to Eleventh Amendment immunity from § 1983 suits. *Ryan v. DCFS*, 185 F.3d 751, 758 (7th Cir. 1999); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). Accordingly, all claims against DCFS through its Acting Director, Edwin McEwen, are dismissed. Official-capacity claims against DCFS employees, including Edwin McEwen and Brent Johnson, are also barred. *Gossmeyer*, 128 F.3d at 495.

*ii. Judges*

For similar reasons, both Judge Nordquist and Administrative Law Judge Daniel Baechle ("ALJ Baechle") are immune from claims against them in their official capacities. Claims for damages against Judge Nordquist (a judge for the State of Illinois) and ALJ Baechle (a DCFS judge) "are barred by the sovereign immunity of [their] employer[s]." *Nowicki v. Cooper*, 56 F.3d 782, 784 (7th Cir. 1995) (affirming dismissal of official-capacity claim seeking damages from a Wisconsin state judge); *Vance v. Watts*, No. 06 CV 1107, 2007 WL 924259, at *2 (C.D. Ill. Mar. 27,

2007) (dismissing official-capacity suit for money damages against referee for a state agency); *Carrillo v. Chambers*, No. 05 C 686, 2007 WL 257634, at *3-4 (N.D. Ill. Jan. 22, 2007) (dismissing § 1983 damages claims against state-court judges under Eleventh Amendment); *Olison*, No. 99 C 4384, 2000 WL 1263597, at *4 (same).

*iii State's Attorney Paul Logli*

The Eleventh Amendment also precludes an official-capacity suit against an Illinois state's attorney. The Seventh Circuit has repeatedly noted that, under Illinois law, "state's attorneys are state officials." *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 265 (7th Cir. 1999); *Garcia v. City of Chi.*, 24 F.3d 966, 969 (7th Cir. 1994). Accordingly, defendant Paul Logli—a former state's attorney in Winnebago County—is shielded from an official-capacity suit seeking monetary damages.

B. Absolute Immunity

Certain defendants contend, moreover, that they are absolutely immune from suit given their judicial or quasi-judicial role in the challenged custody proceedings.

*I. Judges*

In addition to the Eleventh Amendment immunity discussed above with respect to official-capacity suits, Judge Nordquist and ALJ Baechle are entitled to absolute judicial immunity. "Although unfairness and injustice may result on occasion, 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal

consequences to himself.'" *Mireles v. Waco*, 502 U.S. 9, 10, 112 S. Ct. 286, 287 (1991) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347, 20 L.Ed. 646 (1872)). Accordingly, judges are entitled to absolute immunity if they: (1) performed the questioned acts in their judicial capacity; and (2) had the jurisdiction to do so. *See Mireles*, 502 U.S. at 11-12, 112 S. Ct. at 288; *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 1104-06 (1978); *Richman v. Sheahan*, 270 F.3d 430, 434 (7th Cir. 2001); *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1015 (7th Cir. 2000); *Davit v. Davit*, 366 F. Supp. 2d 641, 658-59 (N.D. Ill. 2004). Such immunity will extend "even if the action was in error, was done maliciously, was in excess of [the judge's] authority, and even if [the] exercise of authority is flawed by the commission of grave procedural errors." *Brokaw*, 235 F.3d at 1015 (internal citations omitted). This doctrine applies equally to lawsuits brought under § 1983. *Stump*, 435 U.S. at 355, 98 S. Ct. at 1104; *see, e.g., Dellenbach v. Letsinger*, 889 F.2d 755, 758-59 (7th Cir. 1989) (reviewing five considerations advanced by the Supreme Court in support of absolute judicial immunity).

*a. Judge Nordquist*

Here, Plaintiffs allege *inter alia* that Judge Nordquist committed various procedural errors, issued orders that violated their constitutional rights, failed to timely rule on motions and, particular to Plaintiff Cooney's custody proceedings, refused to recuse himself permanently and altered the official court docket. (*See* Compl. ¶¶ B, H, N at 3, 5-6, 15-16 (general allegations); *id.* ¶¶ 3-7, 13-14 at 20-22, 24-25 (concerning Cooney); *id.* ¶¶ 3, 5, 8, 10, 14-17 at 26-28 (concerning Bornhuetter-Colloton); *id.* ¶¶ 1-2, 6, 12-13 at 28-29, 31, 33 (concerning Griffith-Kraut).) They allege that

Judge Nordquist entertained motions and issued certain orders without notice, without proper hearings and without affording Plaintiffs their right to present witnesses or other evidence. They further allege that Judge Nordquist acted in concert with Defendants Rossiter, Bischoff, and Cain to commit these constitutional violations. (*Id.* ¶¶ 3-8 at 35-37.)

Despite the breadth and weight of these allegations, Plaintiffs have not alleged that Judge Nordquist acted outside his authority. The misconduct described by Plaintiffs concerns actions "taken in the judge's judicial capacity." *Mireles*, 502 U. S. at 11; 112 S. Ct. at 288. Looking as we must to the nature of the acts alleged, it is clear that the substance and timing of Judge Nordquist's rulings, including all of the contested custody orders and evidentiary rulings, fall within the normal functions of a judge. *Id.* at 12-13 (reiterating that "the relevant inquiry is the nature and function of the act, not the act itself") (internal quotations omitted).

Moreover, Judge Nordquist did not exceed the bounds of his jurisdiction in engaging in this conduct. Contrary to Plaintiffs' claim, absolute judicial immunity does preclude litigation against judges, *even where bad faith is alleged.* (Compl. ¶¶ 1-2 at 30-31.) *See, e.g., Forrester v. White*, 484 U. S. 219, 227, 108 S. Ct. 538, 544 (1988) (noting that a judicial act "does not become less judicial by virtue of an allegation of malice or corruption of motive"); *Newman v. State of Ind.*, 129 F.3d 937, 942 (7th Cir. 1997) ("Immunity washes out errors, but absolute immunity washes out bad motives."). Although Plaintiff Cooney, in her response brief, argues that Judge Nordquist lacked jurisdiction on July 9, 2004 to vacate an order of protection against her ex-husband and reduce the

amount of bail bonds issued by a Cook County judge, the Complaint belies this claim. (Docket No. 251, Resp. to Nordquist MTD ¶ 25.) In the Complaint, which is the operative pleading, Plaintiffs specifically allege that the Cook County case was transferred to Winnebago County on July 1, 2004 to be consolidated with Plaintiff Cooney's pending divorce proceedings. (Compl. ¶ 7 at 21-22 & Group Ex. 40 at 1034-35.) According to the Complaint, Judge Nordquist thus had jurisdiction of the related criminal matter when he issued the July 9, 2004 orders. Plaintiffs have not identified any alleged misconduct that would fall outside Judge Nordquist's functions or jurisdiction and thus, he is entitled to absolute immunity from suit.

b. ALJ Baechle

ALJ Baechle is similarly shielded from this litigation based on his quasi-judicial role.

> Absolute judicial immunity is not confined to judges alone. It extends to those "who perform functions closely associated with the judicial process" . . . both prosecutors and witnesses in judicial proceedings, and both administrative law judges and executive hearing officers who perform adjudicatory duties "functionally comparable" to those of a judge.

*Williams v. Rath*, 756 F. Supp. 1103, 1105-06 (N.D. Ill. 1991) (internal citations omitted); *see Butz v. Economou*, 483 U.S. 478, 513-14, 98 S. Ct. 2894, 2914-15 (1978) (reviewing functions of a federal ALJ within framework of agency adjudication and concluding that the role of an ALJ is "functionally comparable to that of a judge"); *see also Reese v. May*, 955 F. Supp. 869, 876 (N.D. Ill. 1996). "In order for quasi-judicial officials to be granted absolute judicial immunity, their acts

must reflect the essence of judicial decision-making and involve discretion of a judicial nature." *McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir. 1986); *see Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 621-22 (7th Cir. 2002) (holding that Chief ALJs for DCFS were entitled to judicial immunity for their docketing decisions, which constituted "an integral part of the adjudicatory process"). When evaluating claims for quasi-judicial immunity, courts also consider other factors, including: "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards . . . ; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Cleavinger v. Saxner*, 474 U.S. 193, 202, 106 S. Ct. 496, 501 (1985) (observing that, following a functional approach, the Supreme Court "has extended judicial immunity to certain others who perform functions closely associated with the judicial process"); *see also Williams*, 756 F. Supp. at 1106 (considering procedural safeguards and holding that Illinois Court of Claims judges are entitled to absolute immunity); *Hernandez-Ortiz v. Godinez*, No. 88 C 5925, 1988 WL 129997, at * 1-2 (N.D. Ill. Nov. 30, 1988) (reviewing the above factors and concluding that an immigration judge in deportation proceedings is entitled to absolute immunity).

Plaintiffs allege that ALJ Baechle refused to recuse himself from adversarial proceedings involving Plaintiff Cooney and denied her request to introduce a witness and certain evidentiary materials. (*See* Compl. ¶¶ F-G, at 5; see also Docket No. 255, Resp. to DCFS MTD ¶¶ 3-4, 16-19, 21) (further describing allegations against ALJ Baechle).) Each of these allegations relate directly to ALJ Baechle's role as a DCFS ALJ and the

orders he entered in that capacity. Pursuant to the Illinois Administrative Code, ALJ Baechle had the authority to, among other things: conduct a hearing; notify participants of their rights and obligations; conduct pre-hearing conferences to discuss procedural issues and narrow the scope of the hearing; "recommend changes in the child abuse and neglect report in the State Central Register; . . . quash or modify subpoenas;" rule on evidentiary as well as substantive legal issues; and render a final DCFS decision. 89 Ill. Admin. Code § 336.120(b). Accordingly, ALJ Baechle's role is "functionally comparable to that of a judge," thus supporting his claim to immunity. *Butz*, 483 U.S. at 513-14, 98 S. Ct. at 2914-15.

Moreover, participants in hearings before DCFS ALJs "may seek judicial review of the [DCFS] decision if it is unfavorable to them" as set forth in the Illinois Administrative Review Law. 89 Ill. Admin. Code § 336.220(b); *see* 735 ILCS 5/3-101 *et seq*. (describing procedures for review of agency decision in Illinois Circuit Courts). Although the ALJ's findings receive deference, the scope of this review is broad. 735 ILCS 5/3-110. Indeed, "the [Circuit Court] hearing and determination shall extend to all questions of law and fact presented by the entire record before the court." *Id*. The Circuit Court has the power "to affirm or reverse the [DCFS] decision in whole or in part," or to order the DCFS ALJ to conduct further proceedings on remand as needed. *Id*. 5/3-111. Furthermore, "[a] final decision, order, or judgment of the Circuit Court, entered in an action to review a decision of an administrative agency, is reviewable by appeal as in other civil cases." *Id*. 5/3-112. Thus, we find that essential procedural safeguards exist, including several levels of appellate review. As a result, and having considered the various factors stated above, we

conclude that ALJ Baechle is absolutely immune from this litigation given his quasi-judicial role.

*ii. Court-Appointed Child Representative*

Defendant Kathryn Bischoff served as the guardian at litem ("GAL") appointed by Judge Nordquist to represent the interests of Plaintiffs' children in each of the three custody proceedings. (Compl. ¶¶ C, N at 3, 14.) Throughout the Complaint, Plaintiffs allege a wide variety of misconduct on Bischoff' s behalf, including violation of a "gag order," refusal to withdraw as GAL in Plaintiff Cooney's case despite her personal and professional relationship with ALJ Baechle, filing motions and taking other actions to ensure that Plaintiffs would be unable to see their children, and recommending Defendant David Jacobsen despite knowledge that he was not licensed to practice as a psychologist in Illinois. (*Id.* ¶¶ 3, 10 at 20, 23-24 (concerning Cooney); *id.* ¶¶ 2, 4-6 at 26 (concerning Bornhuetter-Colloton).) They also claim that Bischoff prevented Plaintiff Bornhuetter-Colloton's daughters from testifying against their father in a domestic abuse matter and intimidated witnesses scheduled to testify on behalf of Plaintiff Griffith-Kraut. (*Id.* ¶ 9 at 27 (concerning Bornhuetter-Colloton); *id.* ¶ 5 at 30 (concerning Griffith-Kraut).) Plaintiffs allege that, in August of 2004, Bischoff left town without transferring prescription medication necessary for Griffith-Kraut's daughter and then assisted her ex-husband in obtaining an order of protection against her by providing false testimony and committing fraud upon the court. (*Id.* ¶ 7 at 31-32 (concerning Griffith-Kraut).) Bischoff also allegedly neglected to meet with Plaintiffs' children for extended periods of time and orchestrated a "witch hunt" against Cooney by suggesting that Cooney inflicted Munchausen syndrome

on her son. (*Id.* ¶ 11 at 32 (concerning Griffith-Kraut); id. ¶ 9 at 37-39 (conspiratorial allegations).)

Bischoff, however, contends that she is immune from such allegations in her role as GAL. Indeed, the Seventh Circuit and courts in our district have agreed, holding that "absent absolute immunity, the specter of litigation would hang over a GAL's head, thereby inhibiting a GAL in performing duties essential to the welfare of the child whom the GAL represents." *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994); *see Golden v. Nadler, Pritikin & Mirabelli, LLC*, No. 05 C 0283, 2005 WL 2897397, at *9-10 (N.D. Ill. Nov. 1, 2005); *Offutt v. Kaplan*, 884 F. Supp. 1179, 1192 (N.D. Ill. 1995). The court in *Golden* reviewed the relevant factors set forth by the Supreme Court (and discussed at Section II.B.i.b.) and concluded that "these factors weigh strongly in favor of granting [the GAL] absolute immunity." No. 05 C 0283, 2005 WL 2897397, at *10 (awarding immunity to child representative in state divorce proceeding). In so holding, the *Golden* court noted that "child custody battles can be emotionally charged, and child representatives in contentious cases may be subject to harassment and intimidation if they are not immune from suit." *Id.* We concur and thus grant Bischoff' s motion to dismiss on the basis of her absolute immunity. *See Scheib*, 22 F.3d at 157 (granting "court-appointed GAL absolute immunity from lawsuits arising out of statements or conduct intimately associated with the GAL's judicial duties").

*iii. Court-Appointed Custodial Evaluators*

In response to Plaintiffs' Complaint, Defendants Lyle Rossiter, Jr., M.D. and David Jacobsen argue that the doctrine of judicial immunity extends to them as well. Judge Nordquist appointed Rossiter and Jacobsen in the Cooney and Bornhuetter-Colloton cases,[4] respectively, to conduct psychological evaluations for his use in resolving the ongoing custody disputes. (*See* Compl. ¶¶ A, N at 2, 15-17 (general allegations); *id.* ¶¶ 3, 13 at 20, 24 (concerning Cooney); *id.* ¶¶ 5-7 at 26-27 (concerning Bornhuetter-Colloton); id. ¶¶ 2-4, 9 at 35-39 (conspiratorial allegations).) Plaintiff Cooney claims that Rossiter violated a "gag order," failed to advise her personally of his need for medical records, and furthered the conspiracy with Judge Nordquist and Bischoff to deprive her of her children while making considerable money off of the proceedings. Similarly, Plaintiff Bornhuetter-Colloton alleges that, at the request of a GAL who paid him $1500, Jacobsen issued an addendum to an earlier custodial report, asserting that she should not be reunited with her children. She also alleges that Jacobsen misrepresented his qualifications and, in fact, practiced without a license in Illinois.

Despite the disturbing nature of these allegations, it is well-established that court-appointed psychological evaluators are "protected by the same immunity extended to judges and other judicial officers." *Bartlett v. Weimer*, 268 F.2d 860, 862 (7th Cir. 1959) (affirming dismissal of § 1983 claim against court-appointed physician, who examined mental health of plaintiff and recommended his commitment, on grounds of

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[4] Neither played any part in Plaintiff Griffith-Kraut's divorce proceedings.

absolute immunity); *see also Duzynski v. Nosal*, 324 F.2d 924, 928-29 (7th Cir. 1963) (similarly affirming dismissal of case against two doctors who served on court-appointed commission to evaluate plaintiff's mental condition); *Wolff v. Faris*, No. 88 C 10765, 1989 WL 84718, at *7 (N.D. Ill. July 20, 1989) (citing *Meyers v. Contra Costa Cty. Dep't of Soc. Servs.*, 812 F.2d 1154, 1158-59 (9th Cir. 1987)) (dismissing § 1983 claims against court-appointed conciliators who mediated custody and visitation dispute). Indeed, state and federal courts throughout the country have held that court-appointed evaluators act as "arms of the court" because they fulfill a "quasi-judicial role at the court's request." *Hughes v. Long*, 242 F.3d 121, 126 (3d Cir. 2001) (holding that child welfare workers enjoyed "judicial immunity because they acted as 'arms of the court,' similar to a [GAL] or court-appointed doctor or psychologist"); *see Vernon v. Rollins-Threats*, No. 04 C 1482, 2005 WL 3842821, at *4-6 & n.4 (N.D. Tex. Nov. 2, 2005) (surveying cases and holding that psychologist who testified in child custody case was entitled to immunity, even where plaintiff claimed that psychologist was not licensed or competent); *Duff v. Lewis*, 114 Nev. 564, 568-69, 958 P.2d 82, 85-86 & n.2 (Nev. 1998) (surveying cases and extending judicial immunity to court-appointed psychologist sued by father who lost custody of his sons based on examiner's report); *Vaughan v. McLeod Reg'l Med. Ctr.*, 372 S.C. 505, 511-12 & n.6, 642 S.E.2d 744, 747-48 (S.C. 2007) (surveying cases and concluding that court-appointed physicians, ordered to evaluate individuals for guardianship proceedings, "are essentially an arm of the judiciary" and are judicially immune from suit challenging "acts performed within the scope of the appointment"). Thus, "[s]ocial workers and like public officials are entitled to absolute immunity in child

custody cases on account of testimony and other steps taken to present the case for decision by the court." *Millspaugh v. Cty. Dep't of Pub. Welfare of Wabash Cty.*, 937 F.2d 1172, 1176 (7th Cir. 1991) (finding social worker absolutely immune from lawsuit filed by mothers who claimed that she failed to provide the court with certain material favorable to them, neglected to provide notice of hearings, and pursued the litigation for improper motives).

Consistent with these authorities, we hold that Rossiter and Jacobsen are immune from suit based on their quasi-judicial role in Plaintiffs' custody proceedings. Plaintiffs have not alleged any facts or offered any legal authority demonstrating that absolute immunity should not apply in this particular case. To the contrary, various policy reasons compel the extension of judicial immunity to Rossiter and Jacobsen. For example, "[e]xposure to liability could deter [psychologists'] acceptance of court appointments or color their recommendations." *Lavit v. Super. Ct.*, 173 Ariz. 96, 99, 839 P.2d 1141, 1145 (Ariz. App. 1992). In addition, the "[t]hreat of liability could undermine [the] objectivity and independence" so essential to their role and to the overall proceedings, particularly in custody disputes. *Id.; see also Lythgoe v. Guinn*, 884 P.2d 1085, 1088-90 (Alaska 1994); *Duff*, 114 Nev. at 569-70, 958 P.2d at 85-87; *Vaughan*, 372 S.C. at 512, 642 S.E.2d at 748. As the Seventh Circuit aptly commented, "a nonjudicial officer who is delegated judicial duties in aid of the court should not be a lightning rod for harassing litigation aimed at the court." *Dellenbach*, 889 F.2d at 763 (internal quotation omitted).

In sum, we find that defendants' claims of judicial or quasi-judicial absolute immunity are well-founded.

Accordingly, we grant the motions to dismiss filed by Defendants Judge Nordquist, ALJ Baechle, Bischoff, Rossiter and Jacobsen on this basis.

III. Statute of Limitations for § 1983 Claims

Several defendants, including Defendants John Budzynski and Paul Logli,[5] seek dismissal based on the expiration of the applicable statute of limitations period. "Section 1983 claims are subject to the statute of limitations for personal injury actions in the state in which the alleged injury occurred." *Behavioral Inst. of Ind., LLC v. Hobart City of Common Council*, 406 F.3d 926, 929 (7th Cir. 2005); *see Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1991) (citing *Wilson v. Garcia*, 471 U.S. 261, 279, 105 S. Ct. 1938, 1948-49 (1985)). "Therefore, [S]ection 1983 claims arising in Illinois are governed by a two-year statute of limitations." *Kelly v. City of Chi.*, 4 F.3d 509, 511 (7th Cir. 1993); *Love v. Sheahan*, 153 F. Supp. 2d 749, 760 (N.D. Ill. 2001). While state law sets the length of the limitations period, "federal law . . . determines the accrual of a claim." *Wilson*, 956 F.2d at 740. Pursuant to federal common law, a claim accrues "when the plaintiff knows or has reason to know of the injury giving rise to the cause of action." *Id.* With respect to § 1983 litigation, "[c]ivil rights claims . . . accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Id.*; *see Kelly*, 4 F.3d at 511; *Love*, 153 F. Supp. 2d at 760. When addressing this accrual issue, we first endeavor to identify the injury and then "determine the date on which the plaintiff could have sued for that injury."

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[5] Although Defendants Bischoff and Jacobsen also raise a statute of limitations defense, we need not address their arguments because, as discussed above, they are immune from this litigation.

*Behavioral Inst. of Ind., LLC*, 406 F.3d at 929; *see* Kelly, 4 F.3d at 511.

The Complaint includes allegations against Defendants Budzynski and Logli primarily concerning Plaintiff Bornhuetter-Colloton. The crux of her complaint, of course, is that she lost custody of her children on September 26, 2000, a situation extended to the present through various judicial orders dated October 13, 2000, October 23, 2001, November 7, 2001, September 23, 2003 and December 22, 2006. (Compl. ¶¶ 3, 5, 8, 10, 14-15 at 27-28.)

A. Defendant Budzynski

Budzynski has been the Colloton childrens' therapist since August of 1998. (Compl. ¶¶ J-K at 7-9.) On September 15, 2000, Bischoff and Budzynski "entered into a course of conduct to assure that Julia Colloton never regained custody of her children." (Compl. ¶ 4 at 26 (concerning Bornhuetter-Colloton) & Group Ex. 13.) Plaintiffs allege that Budzynski—"an unscheduled surprise witness"—was incompetent and testified at the October 13, 2000 hearing that Bornhuetter-Colloton should not have custody, even though he had never (and still has not) met her. (*Id.* ¶¶ 8, 11 at 27.) They further claim that Budzynski helped prevent Bornhuetter-Colloton's daughters from testifying against their father in a domestic abuse proceeding in 1998. (*Id.* ¶ J at 8 (general allegations); *id.* ¶ 9 at 27 (concerning Bornhuetter-Colloton).) In April 2004, Budzynski also allegedly filed a false police report and levied witness harassment charges against Bornhuetter-Colloton. (*Id.* ¶ K at 10 (general allegations); *id.* ¶ 12 at 27 (concerning Bornhuetter-Colloton) & Group Ex. 16 at 260.)

All of these acts, however, occurred outside the 2-year limitations period. According to the Complaint, the most recent activity involving Budzynski occurred on April 22, 2004, when he allegedly filed a false police report accusing Bornhuetter-Colloton of harassing him. (*Id.*) Bornhuetter-Colloton knew or should have known the falsity of those allegations at the time they were made against her; indeed, rather than deny Budzynski's claim, she contends that she "had a right to contact any witness on the witness list in preparation for a hearing" in her custody case. (*Id.* ¶ K at 10.) Even accepting the above allegations of injury as true, we conclude that the claim against Budzynski is time-barred. Plaintiffs did not file their original complaint until May 16, 2007, more than three years after the last incident involving Budzynski, and one year after the statute of limitations had run. Accordingly, we grant his motion to dismiss.

B. Defendant Logli

The Complaint alleges that Logli, as State's Attorney of Winnebago County, threatened to initiate criminal proceedings against Bornhuetter-Colloton in June of 1998 because she continued to complain of domestic abuse by her then-husband, despite the known history of his abuse. (*Id.* ¶ K at 9 (general allegations); *id.* ¶ 1 at 25 (concerning Bornhuetter-Colloton).) Plaintiffs further allege that there "is additional evidence . . . that the office of Paul Logli, was involved in the judicial commitment of Julia to a local State Funded Mental Facility on October 10, 1997, with no evidence, no hearing and in complete disregard of the Constitutional rights of Julia and her children." (*Id.* & Group Ex. 15.) Plaintiffs generally claim that Logli's office "did not do their job in protecting the public" because it failed to enforce protection

orders violated by Cooney's ex-husband in 1994 and 1995. (*Id.* ¶ K at 10-11; *see generally* Docket No. 252, Resp. to Logli MTD.) The Complaint suggests that Logli's office was involved in Budzynski's false charges against Bornhuetter-Colloton in April 2004. (Compl. ¶ K at 10.) Plaintiffs also allege that Logli, along with Bischoff and Budzynski, wrote letters preventing Bornhuetter-Colloton's daughters from testifying in a 1998 proceeding. (*Id.* ¶ 9 at 27.)

First, we note that Plaintiffs' claims appear to be against Logli in his official capacity. The majority of these allegations explicitly allege wrongdoing by "his office," rather than by him personally. As discussed earlier, Logli may be held liable in his individual capacity only, as he is immune from suit in his official capacity pursuant to the Eleventh Amendment. Nonetheless, to the extent that Plaintiffs intended to sue him personally, we conclude that such claims are barred by the statute of limitations. The most recent event involving Logli concerns his office's processing of criminal charges filed against Bornhuetter-Colloton by Budzynski in April 2004. The other alleged misconduct occurred in 1994, 1995 and 1998—well outside the two-year limitations period. In their responses to the present motions, Plaintiffs have not argued that we should toll the limitations period for any reason with respect to Budzynski and Logli. (*See generally* Docket No. 252, Resp. to Logli MTD; Docket No. 288, Bornhuetter-Colloton Resp.) Nor does the Complaint suggest any reason to do so, particularly as the alleged violations were, or should have been, immediately apparent to Plaintiffs. Accordingly, we dismiss the Complaint against Budzynski and Logli as untimely.

## IV. Failure to State a Claim

In their Complaint, Plaintiffs seek to bring claims under 18 U.S.C. § 241; 42 U.S.C. § 1983; 42 U.S.C. §§ 1985-1986 and 5 ILCS 160/3(a). (Compl. at 35-36.) Various defendants contend that Plaintiffs fail to state any plausible claims for relief, and we address these challenges below.

### A. § 1983 Claims

#### *I. State Action Requirement*

"In order to state a claim under Section 1983, a plaintiff must allege that the defendants deprived him [or her] of a right secured by the Constitution or laws of the United States, and that the defendants acted under color of state law." *Brokaw*, 235 F.3d at 1009; *Lekas v. Briley*, 405 F.3d 602, 606 (7th Cir. 2005); *see* 42 U.S.C. § 1983. Generally speaking, to satisfy the second element a plaintiff must allege that defendants are state actors or that, as private citizens, they worked in concert with public officials to cause the constitutional violation.[6] *See Brokaw*, 235 F.3d at 1016. Defendants Klaung, Budzynski, Cain and Bischoff correctly argue that Plaintiffs' § 1983 claims against them must fail because they are not state actors.[7]

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[6] As defendants note, Plaintiffs' Complaint is not exactly a model of clarity. It is unclear whether Plaintiffs assert a § 1983 claim against defendants as individuals, or only to the extent they participated in concerted activity. We shall address both possibilities.

[7] Although we already dismissed the Complaint against Bischoff and Budzynski, we consider whether they are state actors because this analysis becomes relevant in assessing the alleged § 1983 conspiracy.

a. Non-conspiratorial Allegations

The Complaint lacks any allegation, for example, that either Klaung, Budzynski, or Cain—as individuals—are state actors. Plaintiffs allege that Klaung "was the 'therapist' selected by the father, Lorenzo Orlando, to provide therapy for the Orlando children." (Compl. ¶ D at 4.) The single paragraph describing the claim against him states that he "violated [Plaintiff Cooney's] rights and the children's rights," " [h]e testified falsely under oath, and made false statements to DCFS." (*Id.*) We agree with Klaung that the Complaint does not state a claim against him; not only is it vague, but he is plainly not a state actor in his role of private therapist and witness. In her response, Plaintiff Cooney identifies additional facts describing Klaung's incompetence, statutory violations and inappropriate behavior—but still none suggest that he was a state actor plausibly liable under § 1983. (Docket No. 248, Resp. to Klaung MTD, *passim*.)

Similarly, the allegations concerning Budzynski, described above at Section III.A., do not state a § 1983 claim against him individually as a state actor. Like Klaung, Budzynski is a private therapist, who treats the Colloton children. He testified as a witness in an October 2000 hearing. (Compl. ¶¶ J, K at 7-9 (general allegations); *id.* ¶¶ 8, 11 at 27 (concerning Bornhuetter-Colloton).) Although he encouraged the Winnebago County State's Attorney's office to forego calling the Colloton children as witnesses in a related 1998 proceeding and filed a harassment charge against Bornhuetter-Colloton with the local police, these contacts with state officials (apparently voluntary and initiated by him) do not render *him* a state official. (*Id.* ¶¶ J, K at 8, 10 (general allegations); *id.* ¶¶ 9, 12

at 27 (concerning Bornhuetter-Colloton) & Group Exs. 13 at 238, 16 at 260.)

Cain's involvement in the underlying litigation as counsel for Plaintiff Cooney's ex-husband also does not constitute "state action" for purposes of § 1983. Plaintiffs allege that Cain presented documents to a Rockford police detective investigating a child abuse complaint in 2003. (*Id.* ¶ I at 7.) The Complaint further alleges that Cain committed fraud upon the court and violated a "gag" order by disclosing the contents of Dr. Rossiter's report to his client in June 2005. (*Id.* ¶ H at 5-6.) Plaintiff Cooney claims that because of Cain's actions, she "has not had any contact with her two sons, Christopher and Jonathan . . . since June 15, 2005, the day Christopher was removed from court in handcuffs" and transported to Swedish American Hospital for psychiatric evaluation.[8] (*Id.* ¶ 13 at 24 (concerning Cooney); *id.* ¶ 6 at 36 (conspiratorial allegations).) Standing alone, these allegations cannot establish that Cain acted under color of law. *See Offut*, 884 F. Supp. at 1191 ("The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation.").

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[8] Plaintiffs repeatedly claim that, with Cain's coordination, this evaluation of Christopher was conducted without a court order. (Compl. ¶ 13 at 24 (concerning Cooney); *id.* ¶ 6 at 36 (conspiratorial allegations).) To the contrary, however, Plaintiffs' exhibits show that Judge Nordquist ordered the evaluation. (*Id.*, Group Ex. 5 at 110, Tr. of 6/15/05 Hr'g at 19 ("With respect to Christopher Orlando, he shall immediately be brought to Swedish American Hospital for a psychological evaluation. During this process there will be no contact between the Plaintiff and her family and the hospital unless Christopher's psychiatrist allows or directs such contact with mother or other relatives.").

In addition to being immune, Bischoff is not a state actor in her role as GAL. *See Golden*, No. 05 C 0283, 2005 WL 2897397, at *8-9; *Offut*, 884 F. Supp. at 1191-92; *Doe v. Bobbitt*, 665 F. Supp. 691, 694-95 (N.D. Ill. 1987). "Because a guardian ad litem owes [her] undivided loyalty to the minor whose interests [she] represents, courts have reasoned that guardians ad litem, like public defenders, do not act under color of state law in fulfilling their official duties." *Doe*, 665 F. Supp. at 695; *see Golden*, No. 05 C 0283, 2005 WL 2897397, at *9 ("[A]lthough paid by the state, child representatives are charged with representing the interests of the child and not the interests of the state."). This is particularly so where, as here, the GAL's position is not necessarily aligned—and could be adverse—to any position advanced by the state itself. *See Golden*, No. 05 C 0283, 2005 WL 2897397, at n.9 (noting that role of GAL would be more aligned with state's position, and thus may be "state action," in proceeding initiated by state to terminate parental rights rather than in divorce proceedings).

In response to Bischoff' s motion, Plaintiffs have not offered any legal or factual argument demonstrating that she should be considered a state actor by virtue of her role as GAL. (Docket No. 253, Resp. to Bischoff MTD.) In response to a motion to dismiss raising legal questions, a "plaintiff must identify a legal basis for a claim and make adequate legal arguments in support of it." *O'Connor v. Local* 881 UFCW, No. 04 C 5636, 2005 WL 331550, at *2 (N.D. Ill. Feb. 8, 2005); *see Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) ("If [judges] are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning."). Given the relevant authority,

and Plaintiffs' failure to respond to this legal question, we conclude that Bischoff, acting alone, is not a state actor.

b. Conspiratorial Allegations

All that being said, "if a private citizen conspires with a state actor, then the private citizen is subject to Section 1983 liability." *Brokaw*, 235 F.3d at 1016. "To establish Section 1983 liability through a conspiracy theory, a plaintiff must demonstrate that: (1) a state official and private individual(s) reached an understanding to deprive the plaintiff of [her] constitutional rights . . . and (2) those individual(s) were willful participants in joint activity with the State or its agents." *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52, 90 S. Ct. 1598, 1605-06 (1970)); *see Brokaw*, 235 F.3d at 1016; *Bowman v. City of Franklin*, 980 F.2d 1104, 1107-08 (7th Cir. 1993). "A complaint must contain more than mere conclusory allegations of conspiracy; a factual basis for such allegations must be provided." *Bowman*, 980 F.2d at 1107; *see Ryan v. Mary Immac. Queen Ctr.*, 188 F.3d 857 (7th Cir. 1999) (affirming dismissal of conspiracy charges because bare allegations did not satisfy Rule 8). Here, Plaintiffs explicitly allege that Defendants Rossiter, Bischoff, Cain and Judge Nordquist participated in a conspiracy. (Compl. at 35-39 ("Conspiratorial Acts of Defendants").) Elsewhere in the Complaint, they also suggest that Defendants Klaung, Budzynski, Jacobsen and Logli played a part in the alleged conspiracies. (*Id.* ¶¶ J, K & N at 8, 10, 15-17 (general allegations); *id.* ¶ 9 at 27 (concerning Bornhuetter-Colloton); *id.* ¶ 9 at 39 (conspiratorial allegations).)

As discussed earlier, Defendants Judge Nordquist, Bischoff, Rossiter and Jacobsen are immune from

suit.[9] Moreover, Defendants Bischoff, Cain, Klaung and Budzynski are not state actors. Accordingly, we must evaluate whether Plaintiffs have alleged an actionable conspiracy against one or more non-immune defendants, where at least one member of the conspiracy is a state actor. Specifically, we consider whether the Complaint sufficiently alleges a conspiracy between Cain, Klaung, or Budzynski (private non-immune defendants) and Rossiter, Nordquist and/or Jacobsen (state actors).[10] We also assess whether Plaintiffs have adequately pled a conspiracy involving these defendants and Logli, who is a state actor but not immune.[11]

After carefully reviewing the Complaint, we hold that Plaintiffs' conspiracy allegations are too vague and conclusory to state a claim. For example, Plaintiffs summarily state that " [a]s a result of the actions of Dr. Rossiter (605 evaluator), Kathryn Bischoff (Child Representative), Judge Nordquist, Daniel Cain

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[9] A private citizen may be liable for engaging in a conspiracy with a state actor, even if that state actor is immune from liability. *Dennis v. Sparks*, 449 U.S. 24, 28-29, 101 S. Ct. 183, 186-87 (1980) (concluding that "the private parties conspiring with the judge were acting under color of state law; it is of no consequence in this respect that the judge himself is immune from damages liability"); *Burrell v. City of Matoon*, 378 F.3d 642, 649-51 (7th Cir. 2004); *Fries*, 146 F.3d at 457. As a result, the immune defendants in this case must be considered in evaluating the potential liability of private conspirators.

[10] We assume for purposes of this motion that Defendants Rossiter and Jacobsen are state actors, given their quasi-judicial roles as court-appointed evaluators.

[11] In light of the pleading deficiencies discussed herein, we need not reach the issue of whether Logli or Budzynski could be liable for a conspiracy where their individual conduct occurred outside the limitations period.

(counsel for Lorenzo Orlando) and Brian Klaung (therapist for Orlando minors), the Plaintiff, Deborah, has not had any contact with her two sons . . . since June 15, 2005." (*Id.* ¶ 13 at 24.) The Complaint further provides that "Kathryn Bischoff and Dr. Lyle Rossiter, with the aid of Judge Nordquist, Dan Cain and Brian Klaung continued the ongoing violations of Plaintiff, Deborah's Constitutional rights." (*Id.* ¶ 9 at 39.) These statements are insufficient because "mere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of law and are not sufficient to survive a motion to dismiss." *Fries*, 146 F.3d at 458. Rather, a complaint "must contain factual allegations suggesting that defendants reached a meeting of the minds." *Prince v. Campbell*, 314 F. Supp. 2d 793, 795 (N.D. Ill. 2004); *see Ryan*, 188 F.3d at 860 (requiring allegations describing "the form and scope of the conspiracy").

Even when we consider the allegations specific to each defendant, we find they fail to plead a conspiracy. Turning first to Cain, the Complaint alleges that he surreptitiously obtained Dr. Rossiter's report from either Dr. Rossiter, Judge Nordquist or Bischoff, despite a gag order,[12] and then used that report as the basis of a June 2005 motion seeking custody for his client. (Compl. ¶ H at 5 (general allegations); *id.* ¶ 3 at 20 (concerning Cooney); *id.* ¶ 4 at 36 (conspiratorial allegations).) Plaintiffs complain that none of these individuals informed Cooney's counsel that Cain had previously received the report. Regardless of Plaintiffs' suspicions, these allegations are entirely

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[12] Plaintiffs do not allege or explain how Cain, or other defendants, could have violated the court's June 14 "gag order" by delivering or using the report on June 13, before the order was entered. (*See* ¶ H at 5.)

speculative. *Concentra Health Servs., Inc.*, 496 F.3d at 776-77 (reiterating that the "allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a "'speculative level'") (quoting *Twombly*, 127 S. Ct. at 1964, 1973)). Plaintiffs have not alleged that these defendants reached an agreement specifically to deprive Cooney of her constitutional rights.[13] *See Jones v. Messina*, No. 04 C 1415, 2008 WL 192329, at *6 (C.D. Ill. Jan. 23, 2008); *Lyttle v. Killackey*, 528 F. Supp. 2d 818, 831 (N.D. Ill. 2007). As noted earlier, "[t]he minimum ingredient of a conspiracy . . . is an agreement to commit some future unlawful act in pursuit of a joint objective." *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007). Without an agreement, Cain cannot have entered into a conspiracy with either Rossiter or Nordquist.[14] Moreover, as the Supreme Court has observed, "being on the winning side of the lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Dennis*, 449 U. S. at 27-28, 101 S. Ct. at 186-87; *Fries*, 146 F.3d at 458. Cain's successful representation of Cooney's ex-husband—even if assisted by other defendants—cannot, without more, form the basis of a conspiracy claim.

The Complaint is similarly scant with respect to Budzynski, the therapist for the Colloton children.[15] Although there are several references to Budzynski's joint action with Bischoff, she is not a state actor; as a pair, they cannot have formed an actionable con-

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[13] Nor have Plaintiffs alleged how this conduct translates into a violation of Cooney's constitutional rights.

[14] There are no allegations connecting Cain to Jacobsen or Logli.

[15] There are no allegations connecting Budzynski to Judge Nordquist or Jacobsen.

spiracy under § 1983. (Compl. ¶ J at 7-9 (general allegations); *id.* ¶ 4 at 26 (concerning Bornhuetter-Colloton).) Plaintiffs also allege that Budzynski, in conjunction with Bischoff and Logli, sent letters to prevent Bornhuetter-Colloton's daughters from testifying against their father. (*Id.* ¶ 9 at 27 & Group Ex. 13 at 238.) Plaintiffs' exhibits indicate that Budzynski wrote such a letter to an Assistant State's Attorney in Rockford (though not Logli) and discussed it with Bischoff, but the Complaint does not allege the necessary "meeting of the minds." While Budzynski and Bischoff apparently agreed that the girls might be harmed if forced to testify, the Complaint does not allege that Budzynski, with either Bischoff or Logli, agreed to deprive Bornhuetter-Colloton of some right.[16] For the same reason, Plaintiffs' allegation that Budzynski "used the office of State's Attorney, Paul Logli, to file witness harassment charges against Julia" fails to support a conspiracy claim. (*Id.* ¶ K at 10 (general allegations); *id.* ¶ 12 at 27 (concerning Bornhuetter-Colloton).) If anything, the Complaint provides that Budzynski acted on his own.

Turning to Klaung, the Complaint is completely devoid of any factual allegations from which we might infer a conspiracy. Other than the generic conspiracy

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[16] We also question whether Bornhuetter-Colloton suffered a constitutional wrong by the State's decision not to call the minor witnesses to testify at a domestic abuse proceeding against their father.

In addition, an exhibit suggests that the Assistant State's Attorney's decision to forego asking the girls to testify was independent and pre-dated Budzynski's letter. (*See* Compl., Group Ex. 13 at 239, Bischoff Ltr. to Budzynski (stating that Assistant State's Attorney "will not be calling the children" but "if you still wish to send the letter . . . it would be appropriate").) If so, the letter would not have caused any deprivation of right.

allegations discussed above, there are no factual allegations tying Klaung's conduct to any other defendant. (*Id.* ¶ D at 4 (general allegations); *id.* ¶ 9 at 24 (concerning Cooney); *id.* ¶ 13 at 39 (conspiratorial allegations).) *See Ryan*, 188 F.3d at 860.

Finally, we conclude that the Complaint fails to state a conspiracy claim against Logli. Plaintiffs have not alleged any connection between Logli and Rossiter, Cain, Judge Nordquist, Klaung or Jacobsen. We have already addressed the allegations of joint action among Logli, Budzynski and Bischoff. Plaintiffs' § 1983 conspiracy claims are dismissed.

*ii. Personal Involvement Requirement*

At this juncture, there are two individual defendants remaining: Edwin McEwen and Brent Johnson of DCFS. Both contend that the Complaint fails to state a claim against them because it does not allege that they were personally involved in the alleged constitutional deprivations.

As they correctly point out, "a plaintiff only may bring a § 1983 claim against those individuals personally responsible for the constitutional deprivation." *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 614 (7th Cir. 2002); *see Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). "Moreover, under § 1983, a plaintiff may not rely on the doctine of *respondeat superior* to hold supervisory officials liable for the misconduct of their subordinates. Rather, the supervisory officials also must have had some personal involvement in the constitutional deprivation, essentially directing or consenting to the challenged conduct." *Doyle*, 305 F.3d at 614; *see Sanville*, 266 F.3d at 740; *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001).

Here, the Complaint simply does not allege that McEwen or Johnson had a hand in the purported wrongdoing. In fact, Plaintiffs have not identified *any* personal conduct concerning McEwen, and we previously dismissed the official capacity claim against him at Section II.A.i. As to Johnson, the Complaint alleges that he "signed off on all the DCFS reports in re: Deborah; Julia; and Rhonda cases without regards to ensure that the reports are accurate, complete, and investigated appropriately following the Department Administrative Rules." (Compl. ¶ M at 14.) Plaintiffs relatedly claim that one of Johnson's subordinates, DCFS investigator Robert Coffey, failed to comply with numerous regulations in Cooney's case. (*Id.* ¶ E at 5.) Johnson, however, cannot be held liable for Coffey's shortcomings without personal involvement, and the Complaint does not allege that Johnson actually participated in the DCFS investigations. *See Chavez*, 251 F.3d at 651. Plaintiffs do not claim that Johnson knew of, or consented to, the alleged faults contained in the reports he signed. To the contrary, the Complaint alleges that he signed the reports ignorant of any errors because he neglected to ensure their accuracy. Johnson cannot be held liable for negligence, however. "[S]upervisors who are merely negligent in failing to detect and prevent subordinates' mistakes are not liable. . . . The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." *Id.* (quoting *Jones v. City of Chi.*, 856 F.2d 985, 992-93 (7th Cir. 1988)); *see Sanville*, 266 F.3d at 740; *Gossmeyer*, 128 F.3d at 495. Because Plaintiffs have not alleged that Johnson knew about the alleged misconduct and then acted with "deliberate, reckless indifference," we dismiss the § 1983 claim against him. *Id.*

*iii. Policy or Custom Requirement for Municipalities*

In addition to suing various individuals as discussed above, Plaintiffs also bring their § 1983 action against the Rockford Public Schools. In response, the Board of Education of the Rockford School District ("School District") filed a motion to dismiss. Although the School District's sparse motion itself is unconvincing, we dismiss the claim due to an obvious pleading deficiency.

Plaintiffs' claim against the School District stems from the alleged actions of Kristin Schroeder, who taught Griffith-Kraut's daughter (Cheyenne) at the Spring Creek Elementary School, and Lynell Kenny, the school principal.[17] (Compl. ¶ O at 17-19 (general allegations); *id.* ¶¶ 3, 8 at 30, 32 (concerning Griffith-Kraut).) Plaintiffs allege that Schroeder "engaged in very questionable behavior with the father of Cheyenne over a period" spanning 2003 and 2004. (*Id.* ¶ O at 17.) Plaintiffs further allege that Schroeder filed a knowingly false DCFS report against Griffith-Kraut in August 2004, although Schroeder and Kenny failed to report potential incidents of abuse against Cheyenne's father. (*Id.* ¶ O at 18.) Most significantly, Plaintiffs allege that Schroeder and Kenny (along with Mrs. Greenburg, another teacher) failed to keep Griffith-Kraut informed of Cheyenne's progress, despite repeated requests, and refused access to Cheyenne during school hours. (*Id.* ¶ O at 18-19.) For example, in early 2007, Kenny "refused to allow [Griffith-Kraut] to have any contact" with Cheyenne; Kenny

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[17] There are no allegations against the School District concerning the other plaintiffs. In addition, Plaintiffs have not sued the school officials on an individual basis.

prevented her from delivering a Valentine's Day card and denied her "request to observe Cheyenne in her classroom." (*Id.* ¶ 8 at 32.)

"Recovery against a governmental entity—including a school board or school district—under . . . § 1983 may not be based on *respondeat superior*." *Juniel v. Park Forest-Chi. Heights Sch. Dist. 163*, 176 F. Supp. 2d 842, 848 (N.D. Ill. 2001); *see Moore v. Bd. of Educ. of City of Chi.*, 300 F. Supp. 2d 641, 645 (N.D. Ill. 2004); *Burke v. Chi. Sch. Reform Bd. of Trs.*, 169 F. Supp. 2d 843, 846 (N.D. Ill. 2001). In other words, "[m]unicipalities, including school boards, may not be held liable under § 1983 because they employed the tortfeasor acting within the scope of his or her employment." *Burke*, 169 F. Supp. 2d at 846 (citing *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993)); *see Monell v. Dept. of Soc. Servs. of N. Y.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2036 (1978). "Instead, a plaintiff must show that the deprivation of civil rights was caused by some official custom or policy of the municipality." *Moore*, 300 F. Supp. 2d at 645; *Juniel*, 176 F. Supp. 2d at 848. Plaintiffs can meet this requirement by alleging one of three types of a custom or policy:

> (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law; or (3) an allegation that the constitutional injury was caused by a person with final policy-making authority.

*Burke*, 169 F. Supp. 2d at 846; *see Brokaw*, 235 F.3d at 1016; *Moore*, 300 F. Supp. 2d at 645; *Juniel*, 176 F. Supp. 2d at 848. Plaintiffs have not alleged that the

School District maintained an express policy or permitted a widespread practice that encouraged, enabled or otherwise caused Griffith-Kraut's alleged injuries. (Compl. ¶ O at 17-19.)

Plaintiffs also do not allege that Cheyenne's teachers or Principal Kenny had "final policy-making authority" such that their conduct, in effect, became School District policy. *Burke*, 169 F. Supp. 2d at 846-47; *see also Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) ("The question is whether the promulgator, or the actor, as the case may be—in other words, the decisionmaker—was at the apex of authority for the action in question."); *Brandt v. Bd. of Educ. of City of Chi.*, 420 F. Supp. 2d 921, 937 (N.D. Ill. 2006) (starting that the "public officer must be responsible for establishing final government policy respecting such activity before the municipality can be held liable") (internal quotation omitted). Even if we infer from the Complaint that Principal Kenny was "the senior *school* official involved, that does not make her the senior *District* policymaker" concerning the alleged misconduct. *Landstrom v. Barrington Sch. Dist. 220*, 739 F. Supp. 441, 445 (N.D. Ill. 1990) (concluding that principal was not a final policymaker with respect to school-initiated child abuse investigations); *see also Howard v. Bd. of Educ. of Sycamore Comty. Unit Sch. Dist. No. 427*, 893 F. Supp. 808, 816 n.7 (7th Cir. 1995) (noting that defendant "as the high school principal, does not, as alleged, constitute, under Illinois law . . . a policymaker of the Board") (internal citation omitted); *Brandt*, 420 F. Supp. 2d at 937 (concluding the principal was not a final policymaker concerning school conduct and discipline under applicable regulations); *Wood v. Chi. Bd. of Educ.*, No. 07 C 4742, 1998 WL 832656, at *4, n. 1 (N.D. Ill. Nov. 20, 1998)

(holding that defendant principals "are not policy-makers under Illinois law" for purposes of § 1983 claim against school board). Because Plaintiffs failed to allege that a School District "policy or custom" violated Griffith-Kraut's rights, we dismiss their § 1983 claim against the School District.

B. Claim under 42 U.S.C. § 1986

Having disposed of Plaintiffs' § 1983 claims, we address their related claims under another civil rights statute, 42 U.S.C. § 1986. Section 1986 authorizes a damages action against individuals who know about a conspiracy to commit wrongs under 42 U.S.C. § 1985, and who have the power to prevent that misconduct, but who neglect or refuse to do so. Liability under § 1986 is thus derivative of liability under § 1985.[18] *Perkins v. Silverstein*, 939 F.2d 463, 472 (7th Cir. 1991) ("[T]here can be no cause of action under § 1986 absent a viable § 1985 claim."); *see also Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 203 (7th Cir. 1985); *Selep v. City of Chi.*, 842 F. Supp. 1068, 1071 (N.D. Ill. 1993).

Section 1985 permits a private right of action for individuals injured by three types of conspiracies. 42 U.S.C. § 1985. Although Plaintiffs do not specify which provision might be the basis for their presumed § 1985 claim, only § 1985(3) is applicable.[19] To

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[18] Plaintiffs may have intended to bring a § 1985 claim either instead of, or in addition to, the § 1983 conspiracy claim discussed above.

[19] Section 1985(1) permits an action against conspirators who prevent federal officers from discharging their duties. Section 1985(2) generally applies to conspiracies to obstruct justice by intimidating a party, juror or witness for an action pending in federal court. Section 1985(2) also applies to conspiracies to obstruct "the due course justice in any State or Territory, with

establish a claim for civil conspiracy under § 1985(3), a plaintiff must allege:

> (1) the existence of a conspiracy, (2) a purpose of depriving a person or class of persons of equal protection of the laws, (3) an act in furtherance of the alleged conspiracy, and (4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens.

*Brokaw*, 235 F.3d at 1024. To satisfy the second element of this *prima facie* case, a plaintiff must also allege "some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Green v. Benden*, 281 F.3d 661, 665 (7th Cir. 2002); *Brokaw*, 235 F.3d at 1024; *Bowman*, 980 F.2d at 1109; *Rodgers*, 771 F.2d at 203. This requirement of class-based animus is narrowly construed, and the Seventh Circuit recognizes "classes based on race, ethnic origin, sex, religion and political loyalty . . . as possibly supporting a Section 1985(3) claim." *Rodgers*, 771 F.2d at 203 (internal quotation omitted); *Brokaw*, 235 F.3d at 1024.

Like their § 1983 claim, Plaintiffs' § 1985(3) claim fails because they have not adequately alleged the existence of a conspiracy. *Copeland v. Northwestern Mem'l Hosp.*, 964 F. Supp. 1225, 1235 (N.D. Ill. 1997) ("It is not enough for a section 1985 plaintiff to plead mere conclusory allegations of a conspiracy."); *see also Green*, 281 F.3d at 665 (requiring plaintiff to

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the intent to deny any citizen the equal protection of the laws." As a result, § 1985(2)—like § 1985(3)—requires "that the conspiracy be motivated by 'racial or some other type of invidious, class-based discrimination.'" *Lara v. Sheahan*, No. 06 C 669, 2007 WL 1030304, at *6 (N.D. Ill. Mar. 30, 2007) (quoting *Lowe v. Letsinger*, 772 F.3d 544, 547 (7th Cir. 1997)).

prove "that the conspirators agreed to inflict injury upon him" in accordance with a single plan, "the general nature and scope of which was known to each conspirator"). Moreover, they do not claim that defendants were motivated by any class-based animus. That is, the Complaint does not state that defendants engaged in the alleged violations *because of* Plaintiffs' "race, ethnic origin, sex, religion [or] political loyalty." *Rodgers*, 771 F.2d at 203. "In a § 1985 case, such an omission dooms a plaintiff's claim." *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 632 (7th Cir. 1999); *Chambers v. The Habitat Co.*, No. 99 C 2095, 2001 WL 1104615, at *8 (N.D. Ill. Sept. 18, 2001).

A § 1985 claim cannot stand on Plaintiffs' class action allegations, in which they seek damages for themselves and "more mothers who have lost custody of their children and suffered other abuses at the hands of one or more of the defendants." (Compl. ¶ 2 at 33.) "[T]he complaint is styled as a class action, but to say that a group of individuals has been harmed is distinct from saying that the defendants' actions were motivated by animus against a particular class of individuals." Chambers, No. 99 C 2095, 2001 WL 1104615, at * 8; *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-69, 113 S. Ct. 752, 759-60 (1993) (concluding that animus requirement refers to "a purpose that focuses on [a class, i.e.,] women *by reason of their sex*" and that such intent cannot "be determined solely by effect"). "To assert the necessary class-based animus, a plaintiff 'must be able to identify a class with common characteristics that raises the inference that they might be protected,'" rather that point to a group "defined entirely by the defendants' actions." *Wright v. Vill. of Phoenix*, No. 97 C 8796, 2000 WL 246266, at * 8 (N.D. Ill. Feb.

25, 2000) (quoting *Bowman*, 980 F.2d at 1109); *see also Rodgers*, 771 F.2d at 203 (concluding that a class consisting of individuals whose cars were towed by a particular company from a certain neighborhood "is not the readily identifiable group" required by § 1985). Because the Complaint does not allege that Defendants deprived Plaintiffs' rights because they fall within a protected class,[20] the § 1985 and related § 1986 claims are dismissed.

C. Claim under 18 U.S.C. § 241

Plaintiffs allege a violation of 18 U.S.C. § 241, entitled "Conspiracy against rights." (Compl., Count I, ¶ a at 34.) This particular statute, however, is a criminal statute and "it is well settled no private right of action inheres" in criminal provisions. *Pawelek v. Paramount Studios Corp.*, 571 F. Supp. 1082, 1083 (N.D. Ill. 1983); *see Jeffries v. Dutton & Dutton P.C.*, No. 05 C 4249, 2006 WL 1343629, at *7 (N.D. Ill. May 11, 2006); *Jones v. GES Exposition Servs., Inc.*, No. 02 C 6243, 2004 WL 2011396, at *7, n.5 (N.D. Ill. Sept. 7, 2004). Only a federal prosecutor representing the United States can bring a criminal complaint for violation of this statute. *Jeffries*, No. 05 C 4249, 2006 WL 1343629, at *7; Jones, No. 02 C 6243, 2004 WL 2011396, at *7, n.5. Because Plaintiffs may not prosecute a criminal action, this claim is dismissed.

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[20] The Complaint generally suggests that defendants acted out of personal bias or greed, and such allegations cannot state a claim under § 1985(3). *See Nowicki v. Ullsvik*, 69 F.3d 1320, 1325 (7th Cir. 1995) (affirming dismissal of complaint that alleged "that the purpose of the conspiracy was motivated for economic and professional purposes"); *Rodgers*, 771 F.2d at 203.

D. Claim under 5 ILCS 160/3

For similar reasons, Plaintiffs' claim under 5 ILCS 160/3 is dismissed. This Illinois statute, referred to as the State Records Act, provides that all persons "have the right of access to any public records" unless otherwise restricted. 5 ILCS 160/3 (a); *see Family Life League v. Dep't of Pub. Aid*, 112 Ill. 2d 449, 456, 493 N.E.2d 1054, 1057-58 (Ill. 1986) (noting that the "highly desirable goal" of this statue is to ensure that "the public knows how its tax dollars are being spent"). The Illinois Code, however, does not suggest that a private citizen may sue for alleged violations. To the contrary, violations appear to be criminal matters. *See, e.g.*, 5 ILCS 160/24 (requiring Auditor General to ensure compliance with State Records Act and noting that violations of 5 ILCS 160/3(b) are Class B misdemeanors). Moreover, the only allegations supporting such a claim relate to Judge Nordquist, who is immune. (Compl. ¶ 9 at 22-23.)

## CONCLUSION

For the reasons set forth above, we grant defendants' motions to dismiss. (*See* Docket Nos. 180, 183, 185, 191, 198, 202, 208, 212, 221 & 230.) The various motions to transfer venue are denied as moot. This action is terminated. It is so ordered.

/s/ Marvin E. Aspen
Honorable Marvin E. Aspen
U.S. District Court Judge

Dated: August 20, 2008

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[Filed: 10/29/2009]

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No. 08-3675

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DEBORAH ORLANDO COONEY,
*Plaintiff-Appellant*,

v.

LYLE ROSSITER, JR., *et al.*,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 C 2747—Marvin E. Aspen, *Judge*.

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ORDER

Before: WILLIAM J. BAUER, *Circuit Judge*, RICHARD A. POSNER, *Circuit Judge*, DIANE P. WOOD, *Circuit Judge*.

On October 13, 2009, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

No. 09-908

# In The
# Supreme Court of the United States

DEBORAH ORLANDO COONEY,

*Petitioner,*

v.

LYLE ROSSITER, JR., M.D., *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT, LYLE ROSSITER, JR., M.D.

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## QUESTION PRESENTED

Whether, because of well-established and long-standing common law principles, court-appointed special masters, such as custodial evaluators and guardians ad litem, who are performing judicial functions, should continue to have absolute immunity from civil liability under 42 U.S.C. § 1983, for acts done within the scope of their judicial appointments.

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## STATEMENT OF THE CASE

The suit arises out of a family law matter originally filed in the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois. The state court proceeding was a protracted divorce and custody battle which ultimately terminated with custody of Petitioner's children being awarded to their father. During the pendency of the custody proceedings, the state court trial judge appointed an attorney to act as representative (guardian ad litem) for the minor children, Respondent, Kathryn Bischoff, and a forensic psychiatrist to act as a custodial evaluator, Respondent, Lyle Rossiter, Jr., M.D.

Ultimately, the state court trial judge based his custody determination on the conclusions and recommendations of Respondent Rossiter. Specifically, Rossiter opined that Petitioner suffered from Munchausen syndrome by proxy,[1] which she manifested through physical and emotional abuse of her son, primarily by seeking to have him diagnosed with various, serious physical and psychological maladies. Respondent Rossiter also recommended that the

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[1] "Munchausen syndrome by proxy," also referred to as "factitious disorder by proxy" is a form of maltreatment wherein the perpetrator (usually a mother) deliberately induces or exaggerates a physical or psychological problem in the victim (usually a child) for personal gratification. *See, e.g., In re Guardianship of Rebecca B., et al.*, 260 Neb. 922, 926 (2000); *Roska ex rel. v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Adoption of Keefe*, 49 Mass. App. Ct. 818, 819 (2000).

children be placed in the sole and immediate custody of their father.

Petitioner next filed a *pro se* suit in the district court[2] pursuant to 42 U.S.C. § 1983, alleging that the state court judge was at the center of a conspiracy of officers of the court intended to wrongfully deprive her of the custody of her children. The parties to the original suit included the judge, the Winnebago County State's Attorney, her putative spouse's attorney, her children's therapist, the Illinois Department of Children and Family Services, and Respondents in this matter. All defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6). Respondents Rossiter and Bischoff both raised absolute immunity in their respective motions to dismiss.

In their motions to dismiss, both Respondents asserted that long-standing precedent established that experts and guardians ad litem (child representatives) appointed by the court were absolutely immune from civil liability for those acts done within the course of their appointments. Recognizing existing precedent, as to Respondent Bischoff, the court

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[2] She has also filed suit against Respondent Rossiter alleging intentional infliction of emotional distress, a tort recognized under the common law of Illinois, in the Circuit Court for Cook County, case no. 07 L 6089. There is a motion to dismiss pending in that court which also argues absolute immunity. The circuit court has indicated that the motion should be granted but held a final decision in abeyance pending final resolution of this federal matter.

wrote: "Indeed, the Seventh Circuit and courts in our district have agreed, holding that 'absent absolute immunity, the specter of litigation would hang over a [guardian ad litem's] head, thereby inhibiting a GAL in performing duties essential to the welfare of the child whom the GAL represents.'" *Cooney v. Rossiter,* No. 07 C 2747, 2008 WL 3889945, at *7, *8 (N.D.Ill. Aug. 20, 2008) (citations omitted). Again, relying on well-established principles, the district court addressed Respondent Rossiter's immunity: "As the Seventh Circuit aptly commented, 'a nonjudicial officer who is delegated judicial duties in aid of the court should not be a lightning rod for harassing litigation aimed at the court.' *Dellenbach v. Letsinger,* 889 F.2d 755, 763 (7th Cir. 1989) (internal quotation omitted)." *Cooney*, 2008 WL 3889945, at *8.

Similarly, the appellate court below relied upon precedent.

> Rossiter and Bischoff are entitled to absolute immunity. Guardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. *E.g., Jones v. Brennan,* 465 F.3d 304, 308 (7th Cir. 2006) (Illinois law); *Scheib v. Grant,* 22 F.3d 149, 157 (7th Cir. 1994) (same); *Hughes v. Long,* 242 F.3d 121, 127-28 (3d Cir. 2001); *Kurzawa v. Mueller,* 732 F.2d 1456, 1458 (6th Cir. 1984).

*Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009).

Contrary to the assertion in Petitioner's petition that the district court did not properly consider the factual allegations of her complaint, both the district court and the appellate court below reviewed and considered those allegations in their respective decisions. Petitioner has "not alleged any facts or offered any legal authority demonstrating that absolute immunity should not apply in this particular case." *Cooney*, 2008 WL 3889945, at *8.

Even more telling:

> Although Cooney charges that Rossiter and Bischoff were part of an illegal conspiracy to deprive her of custody of the children, they are entitled to absolute immunity because the specific acts (actual or alleged) of which she complains, such as that Bischoff and Rossiter communicated with each other about their perceptions of Cooney and the children, that the conclusions in Rossiter's report are false, and that Bischoff may have given a draft copy of the report to [the husband's attorney] but not to Cooney, all occurred within the course of their court-appointed duties. *Cooney does not allege that Rossiter or Bischoff engaged in misconduct outside that course.*

*Cooney*, 583 F.3d at 970 (emphasis added, citation omitted).

It is from the holding of the Court of Appeals that Respondents are absolutely immune from civil liability pursuant to section 1983, for alleged misconduct done *within the course of their court-appointed duties*, that Petitioner seeks review.

## REASONS FOR DENYING THE PETITION

Petitioner has presented no "compelling reason" why this Court should grant her petition for *writ of certiorari*. *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that there is any conflict with any opinion of this Court and the decision of the U.S. Court of Appeals, below, or between any decisions of the circuits of the Court of Appeals.

Petitioner's argument is essentially twofold. First, that precedent is inapposite because guardians ad litem and court-appointed experts are not recognized as absolutely immune in the common law. Second, that there is a split of authority among the circuits of the Court of Appeals on the applicability of absolute immunity to Respondents. In support of these arguments, Petitioner misstates or misconstrues decisions of both this Court and the Court of Appeals. Respondents file these objections to bring those misstatements to the attention of this Court and urge that the petition for *writ of certiorari* to the Seventh Circuit be denied.

## I. Absolute Immunity Under 42 U.S.C. § 1983.

Relying most heavily on a dissent to this Court's denial of a petition for *writ of certiorari* in prior pronouncement in *Hoffman v. Harris,* 511 U.S. 1060 (1994) (Thomas, J., dissenting), Petitioner urges that absolute immunity in an action brought pursuant to section 1983 may only be extended to those court-appointed officials extant in 1871, when section 1983 became law. Petitioner looks to the point made in the dissent, that a state actor seeking absolute immunity under section 1983 against liability must show that a counterpart privilege was recognized in common law in 1871. *Hoffman*, 511 U.S. at 1060 (citing *Burns v. Reed,* 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)). Petitioner's reliance on this non-precedential remark of the Court is misplaced.

To begin, *Hoffman* involved a question related to quasi-prosecutorial functions where two social workers had *instituted* court proceedings. *Id.* at 1631. Contrasting, in this case, neither of Respondents' court-appointed roles was quasi-prosecutorial. Rather, Respondents here were acting as aids to the judge in determining the best interest of the minor children for purposes of carrying out the judicial function of determining custody. *See* 750 ILCS 5/601, *et seq.* In this light, the question is more properly framed as whether there were counterpart privileges for Respondents which were recognized in 1871. This question is unequivocally answered in the affirmative.

For Petitioner to suggest, as she does, that neither the district court or appellate court below considered whether absolute immunity existed for guardians ad litem and court-appointed experts in 1871 is patently absurd. Both of the lower courts looked to and relied upon existing authority extending absolute immunity to court-appointed officials such as Respondents in granting the motions to dismiss. More importantly, this Court has extended immunity to state actors functioning in a judicial capacity such as that of Respondents.

The law of privilege from suit under section 1983 does not arise from the statute but is largely one of judicial making. *Butz v. Economou*, 438 U.S. 478, 501-02 (1978). Despite the lack of explicit direction in section 1983, this Court has nonetheless "ascertained and announced" appropriate immunities from civil liability under section 1983 in various contexts. *Id.* at 502. In *Butz*, the Court discussed the "cluster of immunities protecting the participants in judge-supervised trials" and concluded that "absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* at 512. Petitioner fails to see the irony in her brief in support. This Court's reasoning behind its holding in *Butz* was the potential that "the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Id.* (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

It may not be argued, either, that the absolute immunity discussed in *Butz*, does not flow from the common law immunities existing in 1871. In *Pierson,* this Court held that judges and those involved in the judicial process were absolutely immune from suits brought pursuant to section 1983. 386 U.S. at 554. The Court specifically discussed the fact that those acting in a judicial role had been granted absolute immunity from suit at common law since long before the passage of the Civil Rights Act of 1871. *Id.* at 554 n.9.

Petitioner suggests that it is error for the courts below to have applied and extended the broad concept of immunity for acts done in the scope of judicial proceedings to specific court-appointed judicial officers. Instead, without support of authority, she asserts that because guardians ad litem and court-appointed experts did not exist in 1871, absolute judicial immunity under section 1983 may not be extended to them. Again, Petitioner either misses or intentionally mischaracterizes the issue. This Court's prior decisions demonstrate that the question is not whether guardians ad litem and court-appointed forensic psychiatrists were around in 1871, but whether there is a functional equivalent that enjoyed common law immunity.

Petitioner argues that before extending absolute immunity to Respondents, the courts below should have considered both "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*,

whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). Petitioner's argument is that Respondents were not performing a judicial function and that, therefore, absolute immunity should not be extended to them.

However, in *Stump,* this Court reversed the holding of the Court of Appeals. The lower appellate court there had found that a judge's alleged behavior was so extreme as to be outside his judicial role. In reversing, this Court wrote:

> Here, both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act. State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim. Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." See *supra*, at 1106. We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that the informality with which he proceeded rendered his action

> nonjudicial and deprived him of his absolute immunity.

*Stump,* 435 U.S. at 362-63.

In the instant matter, both Respondents were appointed as a matter of routine to aid the county circuit court in the disposition of matter involving minors. The Illinois Marriage and Dissolution of Marriage Act provides that "[t]he court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602. In aid of this fundamental determination, "the court may order an evaluation concerning the best interest of the child as it relates to custody, visitation, or removal." 750 ILCS 5/604.5. "In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child." 750 ILCS 5/605. "The court shall, at the court's discretion or upon the request of any party entitled to petition for custody of the child, appoint a guardian ad litem to represent the best interest of the child for the duration of the custody proceeding . . . " 750 ILCS 5/601. Further, the Illinois Supreme Court Rules specifically address the conduct of attorneys and others appointed by the court or retained by the parties in custody proceedings, require strict adherence to ethical guidelines. Ill. S. Ct. R. 907. Those individuals serving the court must "make appropriate recommendations to the parties, and seek appropriate relief in court, if required, in order to serve the best interest of the child." Ill. S. Ct. R. 907.

There can be no dispute that every act of Respondents alleged by Petitioner, even conspiracy, has been alleged to have occurred within the scope of their appointments as judicial officers and that each and every act alleged was judicial in nature. The very authority relied on by Petitioner for her contention that Respondents did not perform judicial functions belies her argument. Just as in *Stump, supra,* even if the allegations of Petitioner's complaint are accepted as true, everything done by Respondents was a function normally performed by a judge and the parties knew that the appointment of a guardian ad litem and a custodial evaluator were both to be expected and within the judicial role under Illinois law.

Again, this Court has used a functional analysis to court-appointed individuals acting in a quasi-judicial role, not based on whether the specific role existed in 1871, but on whether the exercise of the judicial function requires discretion. *See Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 436-37 (1993). The appropriate analysis, employed correctly by the courts below, is whether there is:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safe-guards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

*Cleavinger v. Saxner,* 474 U.S. 193, 201 (1985).

All of the factors necessary for extending absolute immunity to Respondents in this case were addressed by the courts below and found to weigh in favor of immunity. "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges – that is, because they, too, 'exercise a discretionary judgment' as a part of their function." *Snyder v. Nolan,* 380 F.3d 279, 286 (7th Cir. 2004) (citations omitted). Respondents "are arms of the court much like special masters, and deserve protection from harassment by litigants just as judges do." *Cooney,* 583 F.3d at 970.

## II. There Is No Conflict Between Circuits of the Court of Appeals or With Prior Decisions of This Court.

Petitioner mistakenly posits that there are conflicts between circuits of the Court of Appeals regarding whether evaluators, such as Respondent Rossiter, should be granted qualified or absolute immunity from liability under section 1983. As with the balance of her petition, she misreads this Court's and the lower courts' decisions.

In the case of Respondent Rossiter, Petitioner produces a single opinion from the U.S. Court of Appeals from the Ninth Circuit in support of her contention that the circuits are at odds. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003). As she notes in her petition, the Ninth Circuit has held that

court-appointed psychiatrists/evaluators are entitled to absolute immunity in their quasi-judicial roles. *See Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970). According to Petitioner, however, the later decision in *Gammie*, calls *Burkes* into question.

Quite the contrary, the appellate court in *Gammie*, found that in order to address whether social workers were entitled to absolute immunity from liability, it first had to "look to functions that enjoyed absolute immunity at common law in 1871." *Gammie,* 335 F.3d at 897. The court discussed both quasi-judicial absolute immunity and quasi-prosecutorial immunity under the functional analysis. *Id.* at 898. In *Gammie,* the lower appellate court found deferral on the issue of whether defendants were entitled to qualified or absolute immunity to be proper because the plaintiff's complaint contained no allegations of the performance of either quasi-prosecutorial or quasi-judicial functions. *Id.* at 898-99. The court specifically noted that if the functions of the defendants had been alleged, or were ultimately found, to be either "prosecutorial" or "judicial" in function, they "would have enjoyed common-law absolute immunity." *Id.* at 898.

More surprising is Petitioner's attempt to create conflict through reliance on *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984). There, the Court of Appeals for the Sixth Circuit found a court-appointed psychiatrist to be entitled to absolute immunity from liability pursuant to section 1983 using "the analysis employed by the Supreme Court in *Briscoe, Butz,* and *Imbler*." *Id.* at 1458. In *Kurzawa*, the court found the function

performed by the psychiatrist in providing information "to the courts to determine what environment best serves the interests of the child" to be analogous to a witness and, therefore, entitled to absolute judicial immunity. *Id.* Yet, Petitioner plays semantics to argue that this is somehow in conflict with the holding of the appellate court below which used the phrase "arms of the court" rather than, "[t]his function of providing information is analogous to that of a witness . . . " *Id.*

Finally, Petitioner asserts that her petition is analogous to the situation presented in the matter of *Pottawattamie County, Iowa v. McGhee*, 129 U.S. 2002 (08-1065, 2009), in which this Court recently granted a *writ of certiorari* from the Court of Appeals for the Eighth Circuit. *See McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008). Petitioner characterizes this Court's leave to appeal in that case as being motivated by an interest in resolving a split between the circuits on the issue of absolute prosecutorial immunity in the context of the violation of civil rights through the provision of false testimony in furtherance of a criminal prosecution.

The question presented to this Court in *Pottawattamie* is:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights

> by procuring false testimony *during the criminal investigation*, and then (2) introduced that same testimony against the criminal defendant at trial.

(No. 08-1065, Docket) (emphasis added).

In *Pottawattamie*, the circuit court of appeals affirmed the decision of the district court finding that a prosecutor, who had acted as an advocate by having someone arrested *before* probable cause had been established, would not be entitled to absolute prosecutorial immunity. *Pottawattamie,* 547 F.3d at 929 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993)). Thus, it is apparent that to the extent there was a question presented to this Court in that case, it had to do with whether pre-arrest actions of a prosecutor are within the ambit of the prosecutorial role granted absolute immunity at common law.

There is no dispute in this case that no matter how egregious the behavior of Respondents is alleged to be, none of that behavior is alleged to have occurred outside of the scope of their court-appointed roles. *See Stump, supra.* Most importantly, the fact that this Court granted the petition for *writ of certiorari* in the *Pottawattamie* matter is of no consequence because that appeal has been dismissed by this Court pursuant to Rule 46 of the Supreme Court Rules. (No. 08-1065). The parties to this case, including Petitioner, are without knowledge of the reasons for dismissal and, therefore, without basis for arguing that

the decision to dismiss should bear some precedential weight.

## CONCLUSION

As a result, the petition for *writ of certiorari* from the U.S. Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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No. 09-908

Supreme Court, U.S.
APR 23 2010
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States

DEBORAH ORLANDO COONEY,

*Petitioner,*

*v.*

LYLE ROSSITER, JR., M.D., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENT KATHRYN BISCHOFF

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## COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether Petitioner has set forth compelling reasons for the granting of a Writ of *Certiorari* where the Seventh Circuit Court of Appeals properly applied well-settled and long-standing law in ruling that a child representative and a custodial evaluator, who were appointed by the trial court to assist it in determining the best interests of the children in a child custody proceeding, were entitled to absolute quasi-judicial immunity with respect to conspiracy allegations brought pursuant to 42 U.S.C. § 1983 ("§ 1983").

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## STATEMENT OF THE CASE

### I. COUNTER-STATEMENT OF FACTS ALLEGED IN PETITIONER'S AMENDED COMPLAINT

Respondent, Kathryn Bischoff ("Ms. Bischoff"), hereby submits her separate Counter-Statement of Facts, which contains an accurate description of the full allegations in Petitioner's Amended Complaint and supporting exhibits. Even when taken in the most favorable light to Petitioner, the Amended Complaint did not sufficiently state a claim for relief.

#### A. Introduction

Petitioner, Deborah Orlando Cooney ("Petitioner"), is a mother who lost custody of her two minor children after a protracted custody proceeding against her ex-husband, Lorenzo Orlando ("Mr. Orlando") in the Circuit Court Winnebago County, 17th Judicial Circuit, Illinois (the "Custody Matter"). Judge Steven Nordquist ("Judge Nordquist"), the presiding judge in the Custody Matter, based his custody determination upon the conclusions and recommendations of Respondent, Dr. Lyle Rossiter Jr., M.D. ("Dr. Rossiter"), a forensic psychiatrist who had been appointed by Judge Nordquist pursuant to 750 ILCS 5/605 as a custodial evaluator. Specifically, Dr. Rossiter opined that Petitioner had been inflicting a form of child abuse upon her eldest son because she had Munchausen's by Proxy

Syndrome.[1] Dr. Rossiter recommended that custody be immediately transferred to Mr. Orlando.

During the custody proceedings, Judge Nordquist also appointed Ms. Bischoff as a "child representative" pursuant to 750 ILCS 5/506 with the responsibility to assist the trial court in determining the best interests of the children.

On June 15, 2005, Judge Nordquist accepted Dr. Rossiter's conclusions and recommendations and ordered the transfer of custody of the children to Mr. Orlando, further ordering that Petitioner have no contact with them. (the "Custody Order"). Dissatisfied with the Custody Order, Petitioner filed this suit, alleging that Judge Nordquist was at the center of a far-reaching conspiracy (that allegedly included Ms. Bischoff and Dr. Rossiter) to deprive her of custody of her children in violation 42 U.S.C. § 1983 ("§ 1983").

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1. "Munchausen by Proxy," also referred to as "Factitious Disorder by Proxy" is a form of maltreatment wherein the perpetrator (usually a mother) deliberately induces or exaggerates a physical or psychological problem in the victim (usually a child) for personal gratification. *See, e.g., In re Guardianship Of Rebecca B.*, 621 N.W.2d 289, 293 (Neb. 2000); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Adoption Of Keefe*, 733 N.E.2d 1075, 1076 (Mass. App. Ct. 2000).

### B. Petitioner's Conclusory Allegations Of Wrongdoing Against Ms. Bischoff Are Incomplete And Misleading

In her Statement of Facts, Petitioner simply states in conclusory fashion that Ms. Bischoff "directed" Judge Nordquist to appoint Dr. Rossiter, and thereafter:

> Rossiter and Bischoff engaged in numerous fraudulent and intentional acts of misconduct in concert with other actors involved in the custody proceedings. They both engaged in fraudulent misconduct while conducting an investigation. Following the investigation, Rossiter prepared a fraudulent report which was submitted to the court, and Rossiter relied on his report when he testified at trial. As a result of this misconduct, Petitioner's children were removed from her custody and Petitioner was prohibited from contact with her children.

Not only does Ms. Bischoff strongly disagree with Petitioner's conclusory characterizations of her conduct in the underlying custody dispute, she wishes to call this Court's attention to the following additional facts alleged in Petitioner's Amended Complaint.

### C. Additional Facts Alleged In Petitioner's Amended Complaint

The following additional facts are set forth in Petitioner's Amended Complaint and exhibits.

#### 1. The Court's Appointment of Ms. Bischoff and Dr. Rossiter

On October 17, 2002, Judge Nordquist appointed Ms. Bischoff as "child representative" pursuant to 750 ILCS 5/506 for the purpose of assisting him in deciding the Custody Matter. Ms. Bischoff was charged with the responsibility of advocating the best interests of the children. (*See* A.195)[2]

On July 13, 2003, Petitioner made a motion for a psychological evaluation of her children in relation to the Custody Matter. (A.210 at ¶ 1) In late August and early September 2004, Dr. Rossiter was contacted by Mr. Orlando's current wife, Laurie Orlando ("Mrs. Orlando"). Mrs. Orlando informed Dr. Rossiter about the history and nature of the custody dispute between Mr. Orlando and Petitioner, further informing him that eldest son had medical problems and "may be self mutilating." Dr. Rossiter suggested Mrs. Orlando call him back with information regarding the number of

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2. Citation to "A." preceding any number, refers to the page in the Appendix attached to Petitioner's appeal to the Seventh Circuit Court of Appeals. Citation to "R." refers to the Record on Appeal. Citation to "Loose Pl." refers to the Loose Pleadings of the Record on Appeal. "R." and "Loose Pl." citations will include reference to the volume, document and page number of the document referenced.

records, past mediation attempts, past "psych" examinations. Dr. Rossiter further requested Mrs. Orlando to "get all records" or to have Ms. Bischoff contact him regarding the same. Dr. Rossiter also subsequently spoke with the Petitioner regarding his potential appointment. (*See Id.* at ¶ 2; *see also* Ex. 32 thereto at Loose Pl. Vol. 2, Doc. 310-4, P. 112-15)

On September 23, 2004, without objection from any party, Judge Nordquist appointed Dr. Rossiter as custodial evaluator pursuant to 750 ILCS 5/605. (A.210 at ¶2) Judge Nordquist further ordered that that Ms. Bischoff was the only attorney permitted to initiate contact with Dr. Rossiter. (*Id.*; *see also* Loose Pl. Vol. 3, Doc. 310-1, P. 1-4)

### 2. Correspondence Between Dr. Rossiter and Ms. Bischoff Regarding His Appointment

On October 19, 2004, Ms. Bischoff sent Dr. Rossiter a letter introducing herself as the "court-appointed" child representative "and therefore the only attorney involved in the case with whom you may have contact, pursuant to the Court's Order." Ms. Bischoff further informed Dr. Rossiter that after reading the medical reports regarding the eldest son, that she was concerned that "this may be a situation of Munchausen syndrome (on the part of the mother)." (Loose Pl. Vol. 2, Doc. 310-4, P. 116-17)

On May 5, 2005, Ms. Bischoff wrote a letter to Dr. Rossiter informing him *inter alia*, that the Court hoped to have his report by June 6, 2005. Ms. Bischoff further wrote that "[Mr. Orlando's] has asked that I express to

you his client's desire that your report be completed as quickly and expeditiously as possible believing that whatever the report contains [Petitioner] will contest and wish to conduct depositions." (A.212-A.213; Loose Pl. Vol. 2, Doc. 310-4, P. 120)

### 3. Dr. Rossiter's Report, The "Gag" Order, And The June 15, 2005 Custody Order

On June 10, 2005, Dr. Rossiter completed his report in which he made, *inter alia*, the following very troubling conclusions and recommendations:

> (1) Petitioner has "made numerous attempts over a ten year period to induce a great many doctors into making unwarranted diagnoses of severe illnesses or injuries to [her eldest son] by fabricating and exaggerating symptoms which he has never had or had in only a minor degree. . . . mostly oriented around alleged systematic, but actually self-inflicted skin lesions. The results . . . constitute a Munchausen's-by-proxy syndrome. The motivations . . . are reasonably clear: [Petitioner] has attempted to satisfy her own emotional needs and desires with the attentions of health care providers, with excessive immersion in [her eldest son's] care, and with a malicious agenda to punish [Mr. Orlando].

(2) At a cost to the children and direct contradiction to their best interests Petitioner and her parents share delusional beliefs that Mr. Orlando is a criminally dangerous monster bent on harming [the eldest son] and ruining the lives of Petitioner and her family.

(3) [The eldest son's] emotional problems are a result of his being raised by his mother and maternal grandmother;

(4) The "accumulated mental and emotional injuries to [the eldest son] . . . constitute reportable child abuse by [Petitioner] and her parents."

(Loose Pl. Vol. 2, Doc. 310-6, P. 32-33)

Dr. Rossiter further observed that Petitioner, with the support of her parents, suffered delusions and distorted perceptions that have led them to "view [Mr. Orlando] and the legal system as corrupt, unjust, dangerous, and even conspiratorial." Dr. Rossiter further recommended that the children be placed in the sole and immediate custody of their father, Mr. Orlando. (Id. at P. 35-36)

On June 14, 2005, Ms. Bischoff, the attorney for the father (Defendant Dan Cain), and Petitioner's attorney participated in a "chamber conference." During this conference, having been apprised that Dr. Rossiter had completed a draft report, Judge Nordquist put into effect a "gag" order that barred the attorneys from

disclosing the contents of Dr. Rossiter's report to their respective clients (Mr. Orlando and Petitioner) until Judge Nordquist could verify with Dr. Rossiter whether his report was final.[3]

The next day, Dr. Rossiter submitted an affidavit attesting that his "draft" report was actually his final report. Upon learning this information, at a hearing on that day, Judge Nordquist lifted the "gag" order and permitted the attorneys to disclose the report to their respective clients. The Court further permitted Mr. Orlando's attorney to file *instanter* a petition for an order of protection and for an immediate change in custody. Judge Nordquist ruled that Dr. Rossiter's report was a "very thorough . . . [and] very comprehensive report [that] contains very serious and disturbing conclusions and recommendations which I accept. . . ." Accordingly, Judge Nordquist entered the Custody Order. (Loose Pl. Vol. 2, Doc. 310-7, P. 20)

## II. COURSE OF PROCEEDINGS

This case was originally filed in May 2007 as a class action by Petitioner (and two other plaintiffs who also lost custody of their children in proceedings presided over by Judge Nordquist) against the Respondents and numerous other defendants, including Judge Nordquist; Dan Cain, the attorney for the father; Brian Klaung, a therapist who treated petitioner's children after the

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3. As the transcript from the June 15, 2005 hearing reveals, this "gag" order was entered because the report of Dr. Rossiter was labeled as a "draft" and had not been signed. (*See* Loose Pl. Vol. 2, Doc. 310-7, P. 5-7)

entry of the Custody Order and who reported the Petitioner to Illinois' child welfare agency ("DCFS"); DCFS and its director; and Daniel Baechle, the Administrative Law Judge who made a finding that Petitioner had committed child abuse. All Defendants to that action, including the Respondents, filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b), which attacked the legal sufficiency of Petitioner's and her co-plaintiffs' Complaint. While those Motions to Dismiss were pending, Petitioner and her co-plaintiffs moved to voluntarily dismiss the complaint without prejudice. The District Court granted that motion on October 22, 2007, and gave the plaintiffs 90 days to re-plead.

On January 7, 2008, Petitioner and her co-plaintiffs filed their Amended Complaint, which, as Petitioner subsequently acknowledged in her appeal to the Seventh Circuit, was nothing more than the original complaint with a few very minor changes. Defendants renewed their respective Motions to Dismiss. On August 20, 2008, the District Court granted all motions to dismiss with prejudice, entered judgment in favor of the Defendants and terminated the case.

On September 4, 2008, Petitioner alone moved to vacate the judgment pursuant to Rule 59(e) and for leave to file a Second Amended Complaint related only to her claims. On September 23, 2008, the District Court denied that motion.

Petitioner subsequently appealed with respect to the District Court's dismissal of her claims against the Respondents, Judge Nordquist, Mr. Cain (the father's attorney), and Mr. Klaung (the therapist who allegedly

reported Petitioner to DCFS). Petitioner argued that the District Court erred in finding that Respondents were entitled to absolute quasi-judicial immunity. Petitioner further argued that that the District Court erred in finding that the Amended Complaint did not sufficiently state a claim for conspiracy against Mr. Cain and Mr. Klaung, and finally Petitioner argued that the District Court erred in denying her leave to file her Second Amended Complaint pursuant to Fed. R. Civ. P 59(e).

On September 30, 2009, the Seventh Circuit Court of Appeals affirmed the District Court's August 20, 2008 dismissal order. Petitioner filed a petition for rehearing or for rehearing *en banc*, which was denied by the Seventh Circuit Court of Appeals on October 29, 2009.

## REASONS FOR DENYING THE PETITION

The instant Petition should be denied because Petitioner erroneously suggests that this Court has not sufficiently addressed the application of immunity in the context of court appointed child advocates and custody evaluators. Additionally, Petitioner erroneously claims that a split in authority exists among the federal circuits by: (1) erroneously comparing the Respondents to executive branch "social workers" who *initiate* child custody and removal proceedings, rather than properly classifying them as court-appointed officials enlisted to assist the court; and (2) erroneously analyzing this case under an inapplicable "prosecutorial immunity" framework, rather than the well-settled "quasi-judicial immunity" framework that was applied by the Seventh Circuit. As such, there are no compelling reasons to grant the Petition.

Further, even if Petitioner's arguments were accurate, which they are not, it would not change the proper outcome of the case. Indeed, although the issue of the sufficiency of Petitioner's conspiracy allegations against Ms. Bischoff was never reached by the Seventh Circuit because it found that Ms. Bischoff was entitled to absolute immunity, the Seventh Circuit made clear that the allegations in the Petitioner's Amended Complaint failed to state a valid claim for conspiracy against her under § 1983. Indeed, as the Petitioner conceded in the proceedings below, as a non-state actor, Ms. Bischoff could only be liable under § 1983 if she conspired with a state actor (the presiding Judge Nordquist in this case). Petitioner's conspiracy allegations against Ms. Bischoff fell far short of that necessary to state a valid claim.

## I. THE SEVENTH CIRCUIT PROPERLY APPLIED WELL-SETTLED LAW REGARDING QUASI-JUDICIAL IMMUNITY

Petitioner does not challenge that this Court has long held that quasi-judicial immunity is a viable defense, and that where properly applied, such quasi-judicial immunity is absolute. Rather, Petitioner mistakenly contends that absolute quasi-judicial immunity was misapplied in this case because: (1) the roles of custodial evaluator and child representative did not exist in 1871, when § 1983 was enacted, and thus they could not have been immune under the common law; and (2) that the lower courts mistakenly ruled that the Respondents were acting in a quasi-judicial capacity. Neither of these

contentions is accurate, nor does either create a compelling reason for granting the Petition.[4]

### A. Ms. Bischoff, As A Court-Appointed Child Representative, Was Performing A Quasi-Judicial Function

As a threshold matter, the application of quasi-judicial immunity to Ms. Bischoff depends upon whether she was acting in a quasi-judicial capacity. As Petitioner grudgingly acknowledges, this Court has used a "functional approach" to determine whether individuals were acting in a quasi-judicial role. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436-37 (1993). Based upon well settled legal principles, it is undeniable that Ms. Bischoff, as a court-appointed child representative was acting in a quasi-judicial capacity.

There can be no question that Ms. Bischoff was appointed as a matter of routine to aid the county circuit court in the disposition of a matter involving the custody of minors. The Illinois Marriage and Dissolution of Marriage Act provides that "[t]he court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602. Indeed, Illinois courts have affirmed that where a custody matter is before the court, "the issue that singly must be decided is the best interest of the child." *In re Austin W.*, 823 N.E.2d 572, 583 (Ill. App. Ct. 2005) (citation omitted). "A child's best

4. Although this Brief in Opposition addresses Petitioner's arguments as they relate only to Ms. Bischoff, she concurs with the arguments of Respondent Dr. Rossiter, who has filed a separate brief in opposition to the Petition.

interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impregnable from all other factors . . . ." *In Re Ashley K.*, 571 N.E.2d 905, 932 (Ill. App. Ct. 1991). As demonstrated below, child representatives are important tools at the court's disposal to aid it in making that ultimate determination.

As the Seventh Circuit recognized, under Illinois law, "in any proceedings involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities to address the issues the court delineates: (1) to represent the child as an attorney would represent an adult, (2) to be the child's representative, or (3) to be the child's guardian *ad litem*. *See Cooney v. Rossiter*, 583 F.3d 967, 969 (7th Cir. 2009) (discussing 750 ILCS 5/506(a)). The powers and duties of a child representative are very similar to those of a guardian *ad litem*. *See Id.*

In short, while both child representatives and guardians *ad litem* are tasked with the sole duty to assist the court with a determination related to a minor child, they have different powers and means to transmit that information to the court. *See*, 750 ILCS 5/506(a). For example, whereas a guardian *ad litem* is not bound to consider the wishes of the child, a child representative "shall consider, but not be bound by, the expressed wishes of the child." *Id.* Further, whereas a guardian *ad litem* makes a recommendation to the court based upon their investigation, the child representative "shall

not render an opinion, recommendation, or report to the court and shall not be called as a witness" but instead the child representative's recommendations shall be advanced through "evidence-based legal arguments." *Id.; see also In re Marriage of Bates*, 819 N.E.2d 714, 726 (Ill. 2004). Accordingly, it is clear that while the means at their disposal may differ, ultimately, both guardians *ad litem* and child representatives serve the same function as "arms of the court" – to assist the court in its determination of the best interests of the children. *See Cooney*, 583 F.3d at 969; *see also* 750 ILCS 5/506(a). Child representatives serve no other purpose.

### B. This Court Has Long Recognized Quasi-Judicial Immunity, Which Existed in 1871

This Court has long recognized a judicial immunity rooted in the common law. *See Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985). Indeed, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Id.* (quoting *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967)).

This Court has also long extended absolute immunity to those who perform functions closely associated with the judicial process. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that activities that are "intimately associated with the judicial . . . process" are entitled to absolute quasi-judicial immunity); *see also Butz v. Economou*, 438 U.S. 478, 512 (1978). In *Butz*, this Court specifically addressed the "cluster of immunities protecting the participants in judge-supervised trials," concluding that "absolute

immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* Indeed, such immunities are necessary because "the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Id.* (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

Relying heavily on a dissent to this Court's denial of a petition for a Writ of *Certiorari* in *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J. dissenting), Petitioner argues that Ms. Bischoff is not entitled to absolute immunity from liability in an action brought pursuant to § 1983 because her job function did not exist in 1871 when § 1983 was enacted. Specifically, Petitioner seizes upon a statement made in that *Hoffman* dissent that a state actor seeking absolute immunity under § 1983 against liability must show that a counterpart privilege was recognized in common law in 1871, and that the dissent believed that it was not clear that the "social workers" in that case met that criteria. *Id.* at 1060 (citing *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)). Petitioner's reliance on this non-precedential remark is misplaced.

As a threshold matter, the facts in *Hoffman* make it completely inapplicable in this case. Unlike the instant case, which involves a person appointed by the court to aid it in a custody determination and who seeks protection from liability pursuant to principles of quasi-judicial immunity, *Hoffman* involved a question related to child welfare agency "social workers" working under

the auspices of the executive branch who had *instituted* court proceedings alleging abuse and neglect against the parents of a child and who sought protection from liability pursuant to principles of quasi-prosecutorial immunity. *Hoffman*, 511 U.S. at 1060.

In this case, Ms. Bischoff's court-appointed role was not quasi-prosecutorial, nor was her role in any way similar to that of the "social workers" in *Hoffman*. Unlike the *Hoffman* "social workers," Ms. Bischoff: did not initiate the custody proceeding or an investigation; did not work for the government or a child welfare agency; and was not pursuing the interests of the government through quasi-police or quasi-prosecutorial action in furtherance of the goals of the executive branch. Rather, Ms. Bischoff was brought into an existing custody matter between private parties at the pleasure of, and to assist the *court* in carrying out the judicial function of determining the best interests of the children — a determination necessary for the court to rule on the competing custody claims of the parties.

Addressing the underlying issue raised by the dissent in *Hoffman* as it relates to this case, when the role of child representative is properly analyzed it is clear that a counterpart privilege was recognized in 1871. Indeed, this Court has long recognized that judicial immunity flows from the common law immunities existing in 1871. *See Pierson*, 386 U.S. at 554. Importantly, immunity arising from that judicial immunity for officials/persons functioning in a quasi-judicial capacity also clearly existed in 1871. *See Butz*, 438 U.S. at 510 (discussing "common-law precedents extending absolute immunity to parties participating in the judicial process:

judges, grand jurors, petit jurors, advocates, and witness"); *Imbler*, 424 U.S. at 417-19 (discussing the immunity granted to prosecutors as "derivative" of judicial immunity); *Pierson*, 386 U.S. at 554-55 (1967) (discussing the common-law existence of immunity for legislators and judges). Notably, and contrary to Petitioner's theory, in *Pierson*, this Court specifically discussed the fact that those acting in a judicial role had been granted absolute immunity from suit at common law since long before the passage of the Civil Rights Act of 1871. *Id.* at 554 fn. 9.

Indeed, not only has this Court long-recognized such quasi-judicial immunity, but it has actually provided clear guidance to the lower Courts to make such a determination by delineating the following analysis for determining whether an official is acting in such a quasi-judicial capacity: "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safe-guards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Cleavinger*, 474 U.S. at 201.

Notably, a District Court applying the *Cleavenger* factors to a child representative, in a strikingly similar case to the instant case found that " [the *Cleavenger*] factors weigh strongly in favor of granting a [child representative] absolute immunity." *Golden v. Nadler, Pritikin & Mirabelli, LLC*, No. 05 C 0283, 2005 WL

2897397 at *10 (N.D. Ill. Nov. 1, 2005). Specifically, the *Golden* court explained that,

> [c]hild custody battles can be emotionally charged, and child representatives in contentious cases may be subject to harassment and intimidation if they are not immune from suit. Further, the dissatisfied party can bring any concerns before the state court judge if the child representative has acted inappropriately. While in theory the process should not be adversarial because all parties in a custody proceeding should be concerned with the best interests of the child, in practice these proceedings are often adversarial because the parties disagree as to what those interests are. These factors show that absolute immunity is appropriate for child representatives involved in custody determinations.

*Id.*

The "*Cleavenger*" factors clearly demonstrate that the Ms. Bischoff performed a judicial function in this case. Indeed, all of the factors necessary for extending absolute immunity to Ms. Bischoff in this case were addressed by the courts below and found to weigh in favor of immunity. "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges – that is, because they, too, 'exercise a discretionary judgment' as a part of their function." *Snyder v. Nolen*, 380 F.3d 279, 286 (7th Cir. 2004)

(citations omitted). As the Seventh Circuit concluded in this case, Respondents "are arms of the court much like special masters, and deserve protection from harassment by litigants just as judges do." *Cooney*, 583 F.3d at 970.

Finally, there is no dispute that Ms. Bischoff was acting within the scope of her court-appointed role with respect to the alleged wrongdoing. As the Seventh Circuit observed,

> although [Petitioner] charges that Rossiter and Bischoff were part of an illegal conspiracy to deprive her of custody of the children, they are entitled to absolute immunity because the specific acts (actual or alleged) of which she complains, such as that Bischoff and Rossiter communicated with each other about their perceptions of [Petitioner] and the children, that the conclusions in Rossiter's report are false, and that Bischoff may have given a draft copy of the report to [the father's attorney] but not to [Petitioner], all occurred within the course of their court-appointed duties. [Petitioner] does not allege that Rossiter or Bischoff engaged in misconduct outside that course . . . .

*Id.* Accordingly, this Court should, consistent with its actions in *Hoffman*, deny the Petition.

## II. THERE IS NO SPLIT IN AUTHORITY WITH RESPECT TO THE APPLICATION OF ABSOLUTE QUASI-JUDICIAL IMMUNITY FOR THOSE SERVING IN FUNCTIONS SIMILAR TO CHILD REPRESENTATIVES

Petitioner erroneously claims that there is a split in applicable authority among the circuits with respect to the proper application of immunity. As demonstrated above, child representatives are best compared to the role of guardians *ad litem* in custody proceedings – ultimately differing only in the means at their disposal to assist the court. Accordingly, the analysis of the relevant body of law regarding immunity should include analysis of guardians *ad litem* who perform similar roles, and not executive branch child welfare agency workers or "social workers" as Petitioner suggests. When that proper comparison is made, it is clear that the circuits that have addressed the issue have unanimously found that guardians *ad litem* are entitled to absolute quasi-judicial immunity. *See, e.g., Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) ("A failure to grant immunity would hamper the duties of a guardian *ad litem* in his role as advocate for the child in judicial proceedings."); *McCuen v. Polk County, Iowa*, 893 F.2d 172, 174 (8th Cir. 1990) (holding that a GAL was absolutely immune); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989); *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) (holding that absent absolute immunity, the specter of litigation would hang over a guardian *ad litem's* head, thereby inhibiting a guardian *ad litem* in performing the duties essential to the welfare of the child whom the guardian *ad litem* represents; *Short by Oosterhous v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990).

Notably, Petitioner makes no attempt to distinguish child representatives from guardians *ad litem* and accordingly she ignores that well-settled, unanimously applied case law addressing quasi-judicial immunity. Rather, Petitioner erroneously identifies a "split in authority" that does not exist by focusing on inapplicable cases relating to child welfare workers (like those at issue in *Hoffman*) whose immunity defenses were analyzed under an entirely different framework from the guardian *ad litem* cases (i.e. quasi-prosecutorial immunity or witness immunity *versus* quasi-judicial immunity). Indeed, each of the cases discussed or referenced by Petitioner at pp. 18-20 of her Petition that purportedly demonstrates a "circuit split" relate to situations involving "social workers" who worked for government agencies responsible for child welfare, who act under the auspices of the executive branch and who either brought complaints or petitions against the parents, or who investigated or assisted other agencies in investigating suspicions of child abuse or neglect. None of the cases cited by Petitioner involves court appointed child representatives or guardians *ad litem* concerned with assisting the court in custody disputes between private parties.

As demonstrated above, child representatives serve entirely different functions from those persons categorized as "social workers" by Petitioner. Accordingly, even if there were a split in authority with respect to whether "social workers" are absolutely immune pursuant to quasi-prosecutorial or witness immunity standards, such split has no bearing on the issues in this case.

## III. OTHER REASONS FOR DENYING THE PETITION

### A. The Issues in *Pottawattamie* Are Not Similar To The Instant Case

As one of her compelling reasons for granting her Petition, Petitioner asserts that her Petition is analogous to the question presented in the matter of *Pottawattamie County, Iowa v. McGhee*, 129 U.S. 2002 (No. 08-1065, 2009), in which this Court recently granted a *writ of certiorari*. *See McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008). However, the *Pottawattamie* case simply is not analogous to this case.

In *Pottawattamie*, the question presented to this Court in was:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony *during the criminal investigation*, and then (2) introduced that same testimony against the criminal defendant at trial.

(No. 08-1065, Docket) (emphasis added). This issue in no way relates to the facts in the instant case and is of no precedential value in deciding this dispute. The issues involving a prosecutor's conduct in a criminal matter are in no way analogous to the quasi-judicial immunity afforded to court-appointed child representatives and

custodial evaluators. Indeed, even the Petitioner characterizes this Court's granting of the petition in *Pottawattamie* as being motivated by an interest in resolving a split between the circuits on the issue of absolute prosecutorial immunity that issue has no bearing on the issues raised in this case.

### B. Even If Ms. Bischoff Were Not Absolutely Immune, Petitioner's Claims Would Still Have Been Dismissed Because She Did Not Sufficiently Plead The Existence Of A § 1983 Conspiracy

In her appeal to the Seventh Circuit, Petitioner did not dispute that in order to sustain her § 1983 claims she was required to plead the deprivation of a constitutional right resulting from defendants acting under the color of state law. Nor did Petitioner dispute that Ms. Bischoff was not a state actor, and thus could only be liable if she had conspired with a state actor, specifically Judge Nordquist. Although the Seventh Circuit never reached the issue of whether Petitioner's conspiracy allegations were sufficient with respect to Ms. Bischoff because it upheld the dismissal of the Amended Complaint based upon absolute immunity, it is clear from the Seventh Circuit's ruling with respect to the other private actors that Petitioner's conspiracy claims against Ms. Bischoff would also fail because the conspiracy allegations did not sufficiently state a claim.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court addressed the sufficiency of conspiracy claims under § 1 of the Sherman Act, holding that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement of relief' requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Indeed,

> Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

*Id.* at 556 n.3. With respect to the conspiracy allegations in this case, Petitioner was required to state plausible facts that would lead to the conclusion that the Ms. Bischoff and the other defendants "reached an understanding to deprive the plaintiff of [her] constitutional rights," and each of the alleged co-conspirators was a "willful participant in joint activity with" the state actor. *Reynolds v. Jamison*, 488 F.3d 756, 764 (7th Cir. 2007); *see also, e.g., Fries v. Helsper*, 146 F.3d 452, 457-458 (7th Cir. 1998). Consistent with *Twombly*, the Seventh Circuit has held that "mere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of law and are not sufficient to survive a motion to dismiss." *Fries*, 146 F.3d at 458. As the Seventh Circuit found with respect to the other alleged co-conspirators, Petitioner also failed to allege specific facts to meet these requirements with respect to Ms. Bischoff. *See Cooney*, 583 F.3d at 970.

Indeed, Petitioner's forty-two page Amended Complaint contains only the following conclusory allegations which fail to establish any agreement between Judge Nordquist and Ms. Bischoff:

- "[Kathryn Bischoff] acted in concert with Judge Nordquist and Dr. Lyle Rossiter to deprive the [Petitioner], of her rights and the rights of her children." (A.178 at 3, ¶ C)

- "Kathryn Bischoff and Dr. Lyle Rossiter, with the aid of Judge Nordquist . . . continued the on going violations of [Petitioner's] Constitutional rights, and the rights of the Orlando minors . . . ." (A.214 at 39)

To mask this deficiency, Petitioner attempted to create the appearance of specificity by compiling a laundry list of alleged misdeeds by Ms. Bischoff and the other defendants individually or in conjunction with each other, but not with Judge Nordquist. Specifically, with respect to Ms. Bischoff, Petitioner alleged that she improperly:

- orchestrated the appointment of Dr. Rossiter, and was the only attorney permitted by Judge Nordquist to have contact with him (A.210 at 35, ¶2);

- orchestrated a "witch hunt" against Petitioner by "planting the seed" with Dr. Rossiter that Petitioner suffered from "Munchausen's by Proxy" syndrome (A.210 at 35, ¶2);

- communicated with Dr. Rossiter on behalf of counsel for the parties, and in-turn, relayed messages from Dr. Rossiter to counsel for the parties (as she was ordered to do) (A.212-13 at 37-38, ¶9);

- received a letter from Dr. Rossiter in which he purportedly stated that Petitioner's parents could pay his and Ms. Bischoff's fees respective fees but that Mr. Orlando could not (A.213 at 39, ¶9);

- may have been responsible for providing a copy of Dr. Rossiter's report to Mr. Orlando's attorney *before* a gag order was put in place (A.211 at 36, ¶ 4);

- subsequently participated in a "chamber conference," (at which Petitioner's counsel also participated), at which a "gag" order was put into place (A.211 at 36, ¶¶4-5).

Even assuming such alleged acts were wrongful, at best they involved joint action between Ms. Bischoff and Dr. Rossiter, or at most between Ms. Bischoff, Dr. Rossiter and the other private defendants. Further, none of the allegations form any plausible basis for inferring that there was an agreement between Ms. Bischoff *and* Judge Nordquist to violate Petitioner's constitutional rights. Accordingly, the Petition should be denied.

## CONCLUSION

In light of the Seventh Circuit's proper application of the well-settled law related to the application of absolute quasi-judicial immunity to Ms. Bischoff and the obvious failure of Petitioner to sufficiently plead an actionable conspiracy claim pursuant to § 1983, Ms. Bischoff respectfully requests that this Court deny the Petition.

Respectfully submitted,

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